Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CITY OF SANTA ANA, CALIFORNIA,

Petitioner,

v.

PATRICK P. TOCHER, dba
PACIFIC COAST MOTORING; and
SANTA ANA POLICE TOWING ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner City of Santa Ana has regulated local businesses engaged in towing vehicles for decades pursuant to explicit delegation of authority from the State of California. This regulation is designed to protect the public, which typically uses towing services only in emergency situations or involuntarily.

The question presented in this case, as to which the courts of appeals of the second, ninth and eleventh circuits are in conflict, is as follows:

> Consistent with the limitations of the Commerce Clause, may Congress preempt local regulation of the strictly intrastate activities of tow truck businesses and invalidate, without expression of a clear and manifest intent, preexisting state delegation of regulatory authority to local governments?

RULES 29.6 AND 14.1 STATEMENT

Petitioner the City of Santa Ana, is a charter city duly created and organized under the Constitution and laws of the State of California. The City has no parent corporations and no subsidiaries, wholly-owned or otherwise.

Respondent Patrick P. Tocher, dba Pacific Towing Company, is an individual, with no affiliated corporations to the City's knowledge. Respondent Santa Ana Police Towing Association ("SAPTA"), intervenor below on behalf of the City, is an unincorporated association consisting of towing companies who the City undertake non-consensual tows for the City (i.e., towing of vehicles from a crime scene, from the scene of an accident where the victim cannot give consent, and vehicles which are abandoned in the public right-of-way).

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PETITION FOR A WRIT OF CERTIORARI

The City of Santa Ana, California, (hereafter "City" or "Santa Ana") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1-24) is reported at 219 F.3d 1040. The judgment and opinion of the district court (App., *infra*, 25-48) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2000. App., *infra*, at 49. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the Constitution provides in relevant part that "Congress shall have Power * * * To regulate Commerce * * * among the several States." U.S. CONST. art. I, § 8.

The relevant provisions of the Federal Aviation Administration Authorization Act of 1995 ("FAAA Act"), Pub. L. No. 103-305, 108 Stat. 1605 (codified at 49 U.S.C.

§ 14501), as amended by the Interstate Commerce Commission Termination Act of 1995 ("ICC Termination Act"), Pub. L. No. 104-88, 109 Stat. 899, state:

> Sec. 14501. Federal authority over intrastate transportation
>
> * * *
>
> (c) Motor carriers of property. –
>
> (1) General rule. – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of two or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.
>
> (2) Matters not covered. – Paragraph (1) –
>
> (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;
>
> * * *
>
> (C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision

relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) State standard transportation practices. –

(A) Continuation. – Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to –

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907),

* * *

California Vehicle Code § 21100 delegates the State's police power over regulation of towing businesses to local governments, provides in relevant part:

21100. Local authorities may adopt rules and regulations by ordinance or resolution regarding the following matters:

* * *

> (g) Licensing and regulating the operation of tow truck service or tow truck drivers whose principal place of business or employment is within the jurisdiction of the local authority, excepting the operation and operators of any auto dismantlers' tow vehicle licensed under Section 11505 or any tow truck operated by a repossessing agency licensed under Chapter 11 (commencing with Section 7500) of Division 3 of the Business and Professions Code and its registered employees. . . .

The City's municipal code provisions regulating the operations of tow truck businesses are set out at App., *infra*, at 50-70.

STATEMENT

I. INTRODUCTION

The issue in this case is the extent to which Congress, without express findings or clear expression of intent, is able to preempt state and local regulation over purely intrastate commerce in an area which is traditionally within the several states' exercise of the police power. First, whether Congress may, without findings or evidence, and merely by the seemingly careless use of the word "relate," preempt all local regulation of tow trucks simply because the cost of such regulation may "relate to price, route or service." Second, whether as the Ninth Circuit held in direct contradiction to the Second Circuit Court in *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2nd Cir.), *cert. denied*, 120 S.Ct. 166, 145 L.Ed.2d 140 (1999), a State may delegate the financial

responsibility and "safety regulatory authority" reserved to it by Congress over tow truck businesses (49 U.S.C. § 14501(c)(2)(A)) to municipalities, or could Congress carelessly preempt the express State delegation contained in California Vehicle Code § 21100(g).

Grant of certiorari is necessary in this case to resolve this dispute between circuits, particularly in regard to (a) the reach of federal preemption afforded by 49 U.S.C. § 14501(c) over an area of traditional municipal regulation, (b) failure of the panel to give effect to the explicit State legislative delegation of reserved authority to municipalities, and (c) failure of the Ninth Circuit to follow the teachings of the Supreme Court that it read laws explicitly regulating intrastate commerce narrowly and in such a fashion as to avoid "grave and doubtful constitutional questions." *Jones v. United States*, 529 U.S. 848, 120 S.Ct. 1904, 1911, 146 L.Ed.2d 902 (2000).

II. BACKGROUND OF THE CITY'S REGULATORY SCHEME

Santa Ana is the ninth largest city in California and its second most dense city, with a population in excess of 300,000. It is also the primary place of business for numerous tow truck operations. For nearly twenty years, the City of Santa Ana has regulated tow truck businesses by requiring them to, *e.g.*, obtain insurance, collect a $20 fee for the City (used to defray the cost of reporting the vehicle as 'not stolen' but towed on a statewide

database), and post their rates at their places of business.[1] The City regulates in this area both as a charter (*i.e.*, home rule) city and pursuant to longstanding, express State delegation. California Vehicle Code § 21100(g). The State of California has adopted similar regulations, also found preempted by the appellate court.[2] The purpose of the City's and State's regulation can be best illustrated by the following scenarios (all footnotes cite to provisions found preempted by Ninth Circuit):

Scenario 1: A woman's car breaks down in the middle of the night. She is not a member of the AAA, so she calls for a tow truck. The tow truck operator who arrives has no ID card from the city[3] showing that the operator has met minimum police standards and is safe to ride with.[4] The woman must get into this total stranger's truck and ride next to the operator wherever the operator chooses to take her, which does not even have to be within the city limits.[5] If she safely reaches the tow yard, no posted sign will let her know whether she is being overcharged

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[1] It is beyond contravention that the regulation of tow truck businesses is a traditional area of state and local regulation. *See* Validity and Construction of Statute or Ordinance Regulating Vehicle Towing Business, 97 A.L.R. 495.

[2] Another reason for this Honorable Court to reverse and remand this lawsuit is so that the State of California can appear to defend the challenged provisions of the California Vehicle Code. See Fed.R.Civ.P. Rule 19(a) (joinder of indispensable parties).

[3] Santa Ana Municipal Code § 32-100.

[4] Santa Ana Municipal Code § 32-99.

[5] Santa Ana Municipal Code § 32-92.

for her tow,[6] nor will she be entitled to a written statement showing the charges.[7] If she is short on cash, the business is not required to accept her credit card.[8] If she doesn't have the cash to pay for the tow, she must return to pick up her car during whatever hours the lot chooses to be open for release of towed vehicles.[9]

Scenario 2: A man returns to the location where he parked his car a few minutes earlier, only to find that it is gone. Seeing that the private property where he had parked is marked for towing (pursuant to California Vehicle Code § 22658), he finds the property's owner and asks if the owner requested that his car be towed, only to be told that the owner made no such request.[10] The car's owner then calls the police department and reports that his car has been stolen. Neither he nor the property owner nor the police are aware that the car was towed for

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[6] Santa Ana Municipal Code § 32-98.

[7] Santa Ana Municipal Code § 32-95.

[8] California Vehicle Code §§ 22651.1 & 22658(k).

[9] Santa Ana Municipal Code § 32-97.

[10] California Vehicle Code § 22658(1) requires a towing company to obtain written authorization from the property owner before removing a vehicle illegally parked on private property or provide the property owner with a photograph which clearly shows the vehicle as illegally parked. *See also,* California Vehicle Code § 22650 ("It shall be unlawful for any . . . unauthorized person to remove an unattended vehicle from a highway to a garage or to any other place except as authorized in this code.")

being illegally parked on private property because the tow truck business/operator did not notify the property owner or the city.[11] The police department electronically notifies police agencies throughout the State that the car is stolen.

III. BACKGROUND OF FEDERAL REGULATION OF TOW TRUCKS

In 1994, Congress adopted the FAAA Act. Its express purpose was to remedy an unforeseen effect of the Airline Deregulation Act ("ADA"). The interstate operations of Federal Express were deregulated by the ADA; however, its main competitor, United Parcel Service ("UPS") was not. State regulation of intrastate trucking of packages, was causing packages to be shipped across state lines to avoid higher rates imposed by States. *Kelley v. United States*, 69 F.3d 1503, 1507 (10th Cir. 1995). This distinction was expressly cited by Congress as a reason for the adoption in the FAAA Act of identical deregulation language to "motor carriers" such as UPS. *Id.* In short, this was an enactment intended for economic purposes.

The legislative history makes this limited purpose manifest. It states that the FAAA Act was designed to, "as completely as possible level the playing field between air carriers on the one hand and motor carriers on the other with respect to ***economic*** trucking regulation." H.R. Conf. Rep. No. 103-677, at 85, 87 (1994), reprinted in 1994 U.S.C.C.A.N. 1715 (emphasis added). Moreover, the

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[11] Santa Ana Municipal Code § 32-94(a).

House Conference Report on the FAAA Act stresses that the Act was intended to leave in place existing State regulatory authority:

> State authority to regulate safety, financial responsibility relating to insurance, . . . is unchanged, since State regulation in these areas is not a price route or service and thus is unaffected.

House Conference Report on FAAA Act, 1994 U.S.C.C.A.N., at 1757.

Consistent with these expressions of legislative intent, when the FAAA Act was adopted in 1994 it almost certainly did not apply to preempt any State or local regulation of tow truck operation. *Brumfield Towing Service, Inc. v. City of Baton Rouge*, 911 F.Supp. 212, 220 (M.D. La. 1996); *426 Bloomfield Avenue Corp. v. City of Newark*, 904 F.Supp. 364, 374 (D.N.J. 1995).

It was only in 1995, when Congress adopted the ICC Termination Act, adding an additional exception to 49 U.S.C. § 14501(c)(3) for state regulation of "safety regulatory authority" and financial responsibility, which explicitly refers to tow trucks, that Congress belatedly and implicitly added tow trucks to the list of motor carriers covered by subsection (1).

The legislative history of the ICC Termination Act of 1995, which added this new exception to the preemption,[12] makes it clear that the preemption in local control

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[12] The ICC Termination Act also returned to cities the authority to regulate the price that may be charged by tow truck

of tow trucks "would be narrowed, however, to allow State and local governments to regulate the price of" non-consensual tow truck operations, such as Scenario 2 above, ***and related conditions***. Conference Committee Report on H.R. 2539, House Report 104-22, at 218 (December 18, 1995, emphasis added).

IV. THE LOWER COURTS' OPINIONS

The trial court in this case, in a single page analysis (App., *infra*, at 26), apparently accepted Tocher's argument that any regulation of tow truck operations that added even $1.00 to Tocher's costs, was preempted as being "related to price, route, or service." The trial court also held that the State could not delegate its excepted power over "safety regulatory authority" and financial responsibility to local governments. The court also rejected the City's claims under *United States v. Lopez*, 514 U.S. 549 (1995).

The Ninth Circuit found that the City's regulations of tow truck businesses had a direct impact on "price, service or route" and were thus preempted. The Ninth Circuit failed to give effect to the explicit State legislative delegation of reserved authority to municipalities, and failed to follow the teachings of the Supreme Court that it read laws explicitly regulating intrastate commerce narrowly and in such a fashion as to avoid "grave and doubtful constitutional questions." *Jones v. United States*, 529 U.S. 848, 120 S.Ct. 1904, 1911, 146 L.Ed.2d 902 (2000).

While the panel recognized that the Second Circuit reached the opposite conclusion on the ability of the State

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operators for non-consensual tows. The City has never regulated price of any tows, however.

to delegate to local governments the safety and financial responsibility authority left it by Congress, nowhere did the panel attempt to distinguish or address the four reasons the Second Circuit found compelling.

REASONS FOR GRANTING THE PETITION

This Court should grant the City's petition because the circuits are split as to the jurisdictional reach of the FAAA and ICC Termination Acts in preempting state regulation of intrastate commerce in an area of traditional police power, and because the Ninth Circuit reached a decision in this case that is erroneous as a matter of statutory interpretation and constitutional law and seriously infringes on prerogatives reserved to States and municipalities in our system of federalism.

Grant of this petition is especially appropriate because the panel's opinion expressly conflicts with the opinion of the Second Circuit in *Ace Auto Body & Towing, Ltd.*, 171 F.3d 765. The ability and extent of Congressional preemption of local regulation of tow truck operators is clearly an area where there is a need for national uniformity; yet the Second, Ninth and Eleventh[13] Circuits are in clear dispute. The dispute between the Federal Circuits relates not only to the reach of the preemptive effect of the statute, but also the effect of the Congressional exception of state regulatory authority over safety. While the Ninth Circuit recognized that the Second Circuit reached

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[13] *R. Mayer of Atlanta, Inc., et al. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1999), *cert. denied*, 526 U.S. 1038 (1999).

the opposite conclusion, nowhere did the panel's opinion attempt to distinguish or address the four reasons the Second Circuit found compelling.

The Ninth Circuit's opinion also fails to take into account modern Commerce Clause standards adopted by the Supreme Court since 1995. *United States v. Lopez*, 514 U.S. 549 (1995). The panel's one-paragraph opinion on this subject is fatally flawed by the fact it relies on prior rulings that automobiles are instrumentalities of interstate commerce. This is not a case about regulation of automobiles (*e.g.*, *see* App., *infra*, at 23 re: federal carjacking statute), but of non-economic regulation of operators of tow truck businesses.

Finally, grant of this petition will allow this Honorable Court to revisit a tension that exists between several of its opinions interpreting identical language in the Airline Deregulation Act ("ADA") and the Employee Retirement Income Security Act ("ERISA"). In its earliest opinions, such as *Morales v. Trans World Airlines*, 504 U.S. 374 (1992), this Court noted that in enacting the ADA, Congress had determined that "maximum reliance on competitive forces would best further efficiency, innovation and low prices," as well as "variety [and] quality of air transportation services." *Morales*, 504 U.S. at 378. Yet in more recent opinions, such as *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661-62 (1995), this Court read the *Morales* ruling narrowly, and held:

> If "related to" were taken to extend to the furthest reach of its indeterminacy, then for all practical purposes pre-emption would never run its course for "really, universally, relations

> stop nowhere." But that, of course, would be to read Congress's words of limitation against pre-emption out of the law whenever Congress speaks to the matter with generality.

514 U.S. at 655 (citation omitted).

This City's petition should be accepted by this Court so that it may find (a) that the extensive reach of the statute urged by the Ninth Circuit cannot be reconciled with the standards enunciated by this Court in *Lopez* and *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), or (b) this Court may conclude that the preemptive language in this statute, the "related to price, routes, or service" provision, cannot consistently with the Commerce Clause have the broad reach given it by the Ninth Circuit, or (c) that Congress, without a clear and manifest declaration of intent, may not preempt states from delegating the authority to regulate safety and financial responsibility of tow truck operators to local governments.

I. THE NINTH CIRCUIT FAILED TO FOLLOW THIS COURT'S RULINGS ON THE LIMITATIONS OF CONGRESS IN REGULATING PURELY INTRA-STATE COMMERCE

Section 14501 of Title 49 is entitled "Federal Authority Over Intrastate Transportation." It is clear, except perhaps in the Ninth Circuit, that preemption of state and local regulation of tow truck operations involves a federal intrusion into an area of traditional intrastate commerce. The City has consistently raised this issue (the Ninth Circuit incorrectly ascribes this argument to Intervenor SAPTA and not the City, App., *infra*, at 23.)

The Ninth Circuit gives short shrift to the City's argument by merely citing to a case or two that states in passing that Congress has the authority under the Commerce Clause to regulate automobiles (*e.g.*, making a federal crime of carjacking) because cars are instrumentalities of interstate commerce. The court in *United States v. Randolph*, 93 F.3d 656, 660 (9th Cir. 1996), relied upon by the appellate court (App., *infra*, at 23) held the federal carjacking statute to be within the Commerce Clause authority of Congress for three reasons, none of which are applicable to the case at bar: "(1) cars are themselves 'instrumentalities' of interstate commerce, (2) the carjacking statute applies only to cars that have moved in interstate commerce, and (3) Congress, in enacting the carjacking statute, targeted carjacking's harmful effect on interstate commerce."

But the regulations at issue in the case at bar do not regulate automobiles; they regulate tow truck businesses. The regulations at issue do not even regulate tow trucks themselves, such as regulation of storing cans of gasoline on tow trucks, or the thickness of windshields on tow trucks. They regulate the operations of the business to ensure the public's safety.

This Honorable Court has made it abundantly clear that in interpreting a statute regulating intrastate commerce, courts must be governed by "the guiding principle that 'where a statute is susceptible to two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.' " *Jones v. United*

States, 529 U.S. 848, ___, 120 S.Ct. 1904, 1907. The overreaching interpretation of 49 U.S.C. § 14501(c) adopted by the courts below runs afoul of this guiding principle.

The standard for reviewing Commerce Clause regulation was altered by this Court's landmark 1995 opinion in *Lopez*. In *Lopez*, this Honorable Court held that Congress's authority to regulate ***interstate*** commerce cannot be "extended so as to embrace effects upon interstate commerce so indirect and remote to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Lopez*, 115 S.Ct. 1624, 1628-29 (1995). The Court found that in a statute such as the one in the case at the bar, Congress has the power to act only if the activity sought to be regulated "substantially affects interstate commerce." 115 S.Ct. at 1631.

The regulation of tow trucks is an essentially local activity. It is unknown for a tow truck to tow a car picked up in Santa Ana several hundred miles across state lines. The district court received no evidence and made no findings that regulation of tow trucks were part of a larger regulatory scheme which could be undercut if local regulation is disallowed. *Lopez*, 115 U.S. at 1631. Nor did the district court make findings on the intent of the State's and City's regulations; are they intended to regulate market participation or simply safety? Last term, this Court again stressed the requirement of careful and even critical court analysis of enumerated findings in Commerce Clause cases. *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 1752-53, 146 L.Ed.2d 658 (2000). There are no Congressional findings regarding ***tow trucks*** in

the FAAA Act. It was only the presence of such findings regarding UPS and Federal Express that formed the basis of the Tenth Circuit's general holding that 49 U.S.C. § 14501(c)(1) did not violate the Commerce Clause. *Kelley*, 69 F.3d 1503, 1507-08 (10th Cir. 1995).

It was not until the adoption in 1995 of the ICC Termination Act that Congress included tow trucks as "motor carriers" by creating an express exception in 49 U.S.C. § 14501(c)(3) for regulations of non-consensual tow truck operations. Neither the trial court nor the Ninth Circuit has cited to any Congressional findings necessary to meet the *Lopez* standard – *i.e.*, that Congress had evidence that State and local regulation of purely local tow truck operation "substantially affected interstate commerce."

It is respectfully submitted that rehearing and en banc review is necessary; either this Court must find that the statute may not reach to tow truck operations whatsoever under the *Lopez* and *Morrison* test, or this Court may conclude that the preemptive language in this statute, the "related to price, routes, or service" provision, cannot consistently with the Commerce Clause have the broad reach given it by the courts below.

II. THE CIRCUITS ARE SPLIT OVER WHETHER CONGRESS HAS PREEMPTED PREEXISTING, LONGSTANDING STATE DELEGATION OF AUTHORITY TO LOCAL GOVERNMENT IN AN AREA OF TRADITIONAL POLICE POWER

This Honorable Court has consistently ruled that when preemption is invoked to prevent a state or municipality from wielding its traditional police powers, congressional intent to displace that authority must be "clear and manifest." *See California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). Yet despite the paucity of congressional intent, the courts below have read the preemption language of the FAAA Act broadly, and the new exemption to preemption of the ICC Termination Act narrowly.

A. The Ninth Circuit Has Gone Too Far In Expanding The Meaning Of The Term "Related To."

Tocher asserts that any regulation that costs it even one dollar to comply with, "relate to" its prices within the meaning of the FAAA Act, and therefore, any state regulation of these scales is preempted. Tocher further asserts that this Court has adopted a broad interpretation of the words "related to" in the analogous provisions of the ADA, 49 U.S.C. § 41713, in *Morales v. Trans World Airlines*, 504 U.S. 374 (1992) and *American Airlines v. Wolens*, 513 U.S. 219 (1995). Finally, Tocher has asserted that Congress demonstrated its intent to preempt state enforcement such as the City's by failing to make an explicit exception for this kind of enforcement activity.

In *Morales*, this Court noted that in enacting the ADA, Congress had determined that "maximum reliance on competitive forces would best further efficiency, innovation and low prices," as well as "variety [and] quality of air transportation services." *Morales*, 504 U.S. at 378. The court also stated that the purpose of the preemption provision was to "ensure that the States would not undo federal deregulation with regulation of their own." *Id.* This Court interpreted the words "related to" broadly in accordance with the ordinary meaning of the words, and held that state regulation of airline advertisements was preempted. However, this Court acknowledged that some state action may affect an air carrier's fares in "too tenuous, remote, or peripheral a manner" to have preemptive effect. *Id.* at 390.

In *Wolens*, the Court further refined the limit of the preemptive effect of the words "related to," in finding that the FAAA Act preempted frequent flyer claims against an airline under state consumer fraud law, but not claims for breach of contract. This Court there also agreed with the views of the United States, submitted as *amicus curiae*, that the words "relating to rates, routes and services" is most sensibly read, in light of the ADA's overarching deregulatory purpose, to mean that "States may not seek to impose their own public policies or theories of competition or regulation on the air carrier." *Id.* at 229, n. 5 (citation omitted).

However, subsequent decisions of this Court, involving more traditional areas of state regulation, appear to have limited these line of cases and support a narrower reading of the phrase "related to." In *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514

U.S. 645, 661-62 (1995), this Court read the *Morales* ruling narrowly and held that traditional state regulation having no more than an indirect effect on ERISA plans was not "related to" such plans within the meaning of ERISA's preemption clause. The opinion acknowledges, however, that state laws with "acute, albeit indirect, economic effects" might be preempted. *Id.* at 668. Similarly, in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 321-22 (1997), the Court heard an ERISA preemption challenge premised upon the argument that California's Prevailing Wage Law ("CPWL") "related to" and had a "connection with" ERISA plans because the CPWL increased the cost of providing certain benefits under those plans, and thereby affected choices made by ERISA plans. The Court held that CPWL, a law in a traditional area of state regulation, did not have a preemptive effect on ERISA plans because the connection between the ERISA plans and the wage law was too tenuous. *Id.* at 330.

It is respectfully submitted that this Court should grant the City's petition to make clear that the test is not simply whether the City's regulation of tow trucks are "related to" Tocher's rates, routes or services, but whether any such relationship that may exist is, on the one hand, "indirect," "remote," "tenuous," or "peripheral," or on the other, "direct" or one having an acute economic effect.

The Ninth Circuit stated, without any evidence or trial court findings, that Santa Ana's regulations erected barriers to entry into the tow truck business. App., *infra*, at 12. But each and every one of Santa Ana's regulations simply have a cost – they indirectly affect the price of

service, though much less than the cost at issue in *Dillingham* or *Blue Cross*. Santa Ana does not have a discretionary permit system that empowers a public official to deny a tow truck operator the ability to compete in the City. Only very indirectly does the City create "barriers"; that is, the so-called barriers apply only to tow truck businesses that do not want to spend the money to purchase insurance (Santa Ana Municipal Code § 32-91), or post a sign advising customers of their rates (§ 32-98), or be open weekdays from 8:00 a.m. to 5:00 p.m. to release impounded vehicles (§ 32-97), or to require employees operating a tow truck to wear a picture ID certifying that the Santa Ana Police Department has done a background check on the employee and that the member of the public may feel safe getting into the tow truck with him or her (§ 32-100).[14]

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[14] In trying to fit within the standard elucidated by this Court, the Ninth Circuit misstated the City's tow truck business regulations. For example, what the panel refers to as "restrictions on rates charged for towing services, *see id.* § 32-98" (App., *infra*, at 12), is merely a requirement that the tow truck business post a sign with its rates and provide the City with a copy of these posted rates as they may change from time to time. Had the district court or any member of the Ninth Circuit panel ever had his or her automobile towed, these jurists would no doubt be aware that tow truck operators have historically had a somewhat fuzzy view of charges more attuned to a medieval bazaar than the modern business world. The panel's clear implication that Santa Ana restricts the price a tow truck operator may charge for a consensual tow is simply an error in fact, pointed out in the City's petition for rehearing.

Similarly, sections 32-93 through 32-96, though pumped up by the Ninth Circuit into a vast web of regulations, merely state that tow truck businesses cannot tow cars parked on private

Moreover, in reviewing the four Supreme Court cases discussed above, this Court should find that the facts align closer to those of *Blue Cross* and *Dillingham* than *Morales and Wolens*. Unlike airline advertising and frequent flyer plans, states have long regulated tow truck operations just as they have long regulated prevailing wages. The opposing claims appear to be essentially ones of inconvenience and incrementally increased costs, not ones showing significant impacts upon prices or services. More importantly, the enforcement scheme of the City does not create distinct and possibly inconsistent standards. States are not duplicating a federal scheme of regulation of intrastate tow truck operations; rather states are regulating in an area of the police power within their traditional authority.

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property without authorization (the Ninth Circuit apparently believes that federal economic deregulation empowers tow truck businesses to effectively steal automobiles?), notify the City that the towed car has not been stolen (*i.e.*, ensures that neither the owner nor the City would report and place the car on the State stolen vehicle computer network), provide the owner with a written invoice and not make alterations or repairs to the towed car. The Ninth Circuit contends that these "requirements directly affect the price, route or service of a motor carrier." App., *infra*, at 13. But it is that bald conclusion, without any analysis of the cost of meeting these requirements (if any), or analysis of the narrowness with which this Court has required in the past in interpreting these preemption measures, that has led the panel to error. It is respectfully submitted that any true analysis of the cost of complying with all of the regulations at issue would prove their cost to be far less than the cost of compliance found to be insufficient to justify preemption in *Blue Cross* or *Dillingham*.

B. Even If The Regulations At Issue Are Within The Preemptive Reach Of 49 U.S.C. § 14501(C), This Court Should Take This Case To Resolve The Dispute Between Circuits As To Whether Such Regulations Are Saved By The Statute's Exception For "Safety Regulatory Authority" And "Minimum Amounts Of . . . Insurance."

The Ninth Circuit seemed all too keen to ignore fundamental principles of federalism and find that Congress and not the States control the powers reserved to the States under the Constitution. The Ninth Circuit's opinion also failed to disclose, let alone distinguish, any of the four separate and distinct reasons that the Second Circuit reached the opposite conclusion, after reviewing numerous district court opinions around the country that reached identical conclusion.

First, the legislative history accompanying the 1994 adoption of the FAAA Act makes clear the Act's purpose – to put UPS on equal footing with Federal Express. *Ace Auto Body*, at 772. The House Conference Report makes clear that the exemptions to preemption "simply reflect the fact 'that State authority to regulate safety, financial fitness and insurance . . . of motor carriers is unchanged since State regulation in those areas is not a price, route or service and thus is unaffected.' " *Id.*, quoting H.R. Conf. Rep. No. 103-677 at 85, reprinted in 1994 U.S.C.C.A.N at 1757. The California Vehicle Code section quoted above first delegated this authority to cities in the 1960's and has been in its current form since 1985. California Stats. 1985, c.710. Had Congress intended in 1995 to strip California of the authority to delegate safety

regulation of tow truck businesses to municipalities, Congress was required to make that intention clear, and not state that its intention was exactly the opposite.[15]

Second, "the reports issued in connection with § 14501 suggest that its primary purpose was to eliminate local economic regulation, not local safety regulation." *Ace Auto Body*, at 776. There is no finding, by either the Ninth Circuit panel or the district court that Santa Ana's safety and minimum insurance regulations are the equivalent of price fixing; only that the State may not delegate this power to Santa Ana.

Third, to the extent that Congressional intent is unclear (which must be the case, given the dispute between Circuits), it is appropriate to look to the interpretation given the statute by the Secretary of Transportation, who has made it clear that the exceptions in question exempts both "State [and] local regulation" from preemption. *Id.*, quoting letter from Secretary of Transportation included in the record below.

Fourth, while the Eleventh Circuit in *Mayer* relies on the precept of *expressio unis est exclusio alterius*, the Ninth Circuit failed to note that this maxim must fail in light of

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[15] Similarly, the legislative history of the 1995 amendment to 49 U.S.C. § 14501(c), part of the ICC Termination Act of 1995, which added a new exception allowing price control of nonconsensual towing, makes it clear that the preemption in local control of tow trucks "would be narrowed, however, to allow State and local governments to regulate the price ***and related conditions*** of" non-consensual tow truck operations. Conference Committee Report on H.R. 2539, House Report 104-22, at 218 (December 18, 1995, emphasis added).

the obligation under ERISA, ADA and the FAAA Act that Congress' intent to supplant State law in these areas of traditional State concern must be manifest and the courts must presume against it. *Ace Auto Body*, at 773.

The fear of the Eleventh Circuit in *Mayer* (and the Ninth Circuit at the case at bar), that a tow truck hauling a car across numerous counties would be subject to differing requirements, such as different minimum levels of insurance (*Mayer*, 158 F.3d at 546 n.6), is simply not present in California. The Vehicle Code delegation clearly gives regulatory authority to only a single city; *i.e.*, the tow truck business must comply with the safety and financial assurance regulations of the city where its "principal place of business or employment is within the jurisdiction of the local authority." California Vehicle Code § 21100(g).

Finally, it is clear that the Ninth and Eleventh Circuits have failed to understand one simple point – that exclusion of the term "local subdivisions" from the exemption to preemption, while it is located in other sections, is irrelevant to the issue of whether Congress intended to preempt states from delegating their authority to cities such as Santa Ana. At most this failure merely implies that Congress itself did not intend to make such a delegation. Based on the concept that "governmental units are created as convenient agencies for exercising such of the governmental powers of the State that may be entrusted to them . . . in [its] absolute discretion," this Court has held that the most plausible reading of an express delegation by Congress to the states is that each state's authority to delegate to cities remains vested

within its sound discretion. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607 (1991).

III. THE QUESTION PRESENTED IS IMPORTANT

There is a clear dispute between the Eleventh, Second and Ninth Circuits as to whether a state may delegate its authority to regulate safety and insurance requirements to local governments. And, although this Court has twice declined to grant certiorari, this issue is important.

A number of courts, in addition to the Ninth Circuit in the case at bar, continue to struggle with the dispute between circuits that exists on whether states may delegate their regulatory authority. Some have come down in favor of Santa Ana's and the Second Circuit's position. *New Orleans Towing Association, Inc., et al. v. City of New Orleans, et al.*, 2000 WL 193071 (E.D.La. 2000); *Hott v. City of San Jose*, 92 F.Supp.2d 996 (N.D.Cal. 2000); *Harris County Wrecker Owners, etc. v. City of Houston*, 943 F.Supp. 711 (S.D.Tex. 1996); *AJ's Wrecker Service, Inc. v. City of Dallas*, 1999 WL 185521, *3 (N.D.Tex. 1998). Others have agreed with the Eleventh Circuit and Ninth Circuit. *Cedar Bluff 24-Hour Towing, Inc. v. City of Knoxville*, 78 F.Supp.2d 725 (1999); *Petrey v. City of Toledo*, 61 F.Supp.2d 674 (N.D. Ohio 1999). All of these courts have been troubled by the dispute between circuits, and have had to waste valuable judicial resources to attempt to resolve this dispute. And these cases will continue to arise so long as this Honorable Court declines to address this issue; counsel for the City has been contacted by numerous cities throughout

the country engaged in similar litigation since the Ninth Circuit's opinion.

Moreover, as discussed above, accepting certiorari in this case would help resolve the longstanding dispute between *Morales* and *Blue Cross* as to the extent of reach of the phrase "relating to" by Congress. Further direction to the inferior courts on this issue will help not only in interpreting local regulation of tow trucks, but in interpreting the extent of state and local regulation in the fields of solid waste (*see, e.g., Woodfeathers, Inc. v. Washington County, Oregon,* 180 F.3d 1017 (9th Cir. 1999), ERISA, ADA (*Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998)), and tort regulation (McFarland, The Preemption of Tort and Other Common Causes of Action Against Air, Motor, and Rail Carriers, *Transportation Law Journal,* 24 Transp. L.J. 155 (1997)).

It is clear that there is disarray in the federal courts due to this ongoing dispute. It is respectfully submitted that this Court should grant the City's petition in order to resolve this issue.

IV. THE PETITION SHOULD BE GRANTED, NOT HELD FOR *SOLID WASTE AGENCY v. U.S. ARMY CORPS OF ENGINEERS*

Recently, this Court heard oral argument on a case brought by a conglomeration of Illinois local governments asserting that the Commerce Clause prohibits the Army Corps of Engineers from extending their regulatory authority under the Clean Water Act to non-navigable waters. Supreme Court Case No. 99-1178.

This case is very different from the case at bar. The *Solid Waste Agency* case does not involve economic regulation, but environmental regulation. Indeed, if accepted, the case at bar would be the first case since *Lopez* itself to analyze a economic regulation under the Commerce Clause.

Moreover, nothing in *Solid Waste Agency* will help to resolve the dispute between circuits on whether preexisting and longstanding state delegation of authority to local governments may be preempted by Congress under the FAAA and ICC Termination Acts. Whether affirmed or reversed, *Solid Waste Agency* will not address this issue.

In light of these differences, and because the courts of appeals are in disarray as to an important issue concerning the scope of the Commerce Clause that will not be settled in *Solid Waste Agency*, we urge this Court to grant independent review in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 2000

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICK P. TOCHER, an individual, dba Pacific Coast Motoring, *Plaintiff-Appellee,*	
v.	No. 97-55628
CITY OF SANTA ANA; PAUL WALTERS, *Defendants-Appellants,*	D.C. No. CV-95-00224-AHS
and	
CITY OF TUSTIN; CITY OF COSTA MESA; SANTA ANA POLICE DEPARTMENT; W. DOUGLAS FRANKS; TUSTIN POLICE DEPARTMENT; COSTA MESA POLICE DEPARTMENT, *Defendants.*	

PATRICK P. TOCHER, an individual, dba Pacific Coast Motoring, *Plaintiff-Appellee,*	
v.	No. 97-55660
CITY OF SANTA ANA; PAUL WALTERS, *Defendants.*	D.C. No. CV-95-00224-AHS
	OPINION
SANTA ANA POLICE TOWING ASSOCIATION, *Applicant in Intervention-Appellant.*	

Appeals from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Argued and Submitted
July 14, 1999 – Pasadena, California

Filed July 14, 2000

Before: Melvin Brunetti, Pamela Ann Rymer, and
Barry G. Silverman, Circuit Judges.

Opinion by Judge Brunetti

COUNSEL

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Michael P. McGovern, Ayres and Parkey, Knoxville, Tennessee, for the plaintiff-appellee.

Mark S. Rosen, Santa Ana, California, for the intervenor-appellant.

OPINION

BRUNETTI, Circuit Judge:

Patrick Tocher ("Tocher"), the operator of a tow truck business in Santa Ana, California, filed this action against the City of Santa Ana ("City"), alleging that the city's ordinances regulating the automobile towing industry are preempted by 49 U.S.C. § 14501(c). The district court concluded that Santa Ana's tow truck ordinances were preempted by section 14501(c) and entered a judgment permanently enjoining the City of Santa Ana from enforcing any law related to the price, route, or services of

towing businesses and/or individuals engaged in the tow truck business as either principals or employees. The City of Santa Ana and the Santa Ana Police Towing Association appeal from the district court's final judgment. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part and reverse in part.

I.

The City enacted a set of municipal ordinances that regulate automobile towing operations and tow trucks. *See* Santa Ana Municipal Code ("SAMC"), § 32-81, *et seq.* The ordinances create a dual permit system that requires towing businesses and individual tow truck operators to obtain City permits and comply with certain City regulations. To operate a towing company, a person must, among other things, obtain a "towing operation" permit from the City, *see* SAMC § 32-82, maintain approved storage facilities, *see* SAMC § 32-93, and keep certain business hours. *See* SAMC § 32-97. The ordinances also establish certain standards that regulate the interaction of towing companies and private individuals. For instance, towing companies must obtain written authorization before making consensual tows, *see* SAMC §§ 32-93, notify the police of any non-consensual tows, *see* SAMC 32-94, provide itemized statements to people who authorize vehicle tows, *see* SAMC 32-95, and publicly display their rates and charges for towing services. *See* SAMC 32-98. To operate a tow truck in the City, a tow truck operator must obtain an operator's permit, which requires an applicant to pay a fee and provide the chief of police with information about the applicant's criminal and employment history. *See* SAMC §§ 32-99 and 32-100.

The ordinances also authorize the chief of police to establish a rotational tow list for the Santa Ana Police Department that provides towing services for vehicle impoundment. *See* SAMC § 32-107. The Santa Ana chief of police has established a rotational tow list and that list is currently limited to eight towing companies that hold City-issued operation permits. Under the rotational tow list, the City dispatches the towing companies in turn whenever it needs a car impounded, but the owner of an impounded vehicle, not the City, pays for the towing services.

Tocher operates a towing business in Santa Ana. He and his employees have received citations from the City and have been threatened with legal action because they have failed to comply with the City ordinances regulating towing operations and tow truck drivers. The City has demanded that Tocher and his employees obtain the required City permits before engaging in any further towing operations within the City. Tocher filed this lawsuit in federal district court in an attempt to prevent the City from enforcing its towing ordinances. Tocher alleged that the City's ordinances are preempted by the Federal Aviation Administration Authorization Act of 1995 ("FAAA"), Pub. L. No. 103-305, 108 Stat. 1605 (codified at 49 U.S.C. § 14501), as amended by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 899.

The district court granted Tocher a preliminary injunction and then conducted a non-testimonial bench trial based on stipulated facts in order to determine whether Tocher was entitled to permanent injunctive relief. After the bench trial, the district court granted

judgment in favor of Tocher, concluding that the City's tow truck ordinances were preempted by federal law and enjoining the City from enforcing any law related to the price, route, or services of towing businesses and/or individuals engaged in the tow truck business as either principals or employees. Specifically, the district court enjoined the City of Santa Ana and its officials from enforcing any laws pursuant to Santa Ana Municipal Code sections 32-81 through 32-107. It also enjoined the further application of several provisions in the California Vehicle Code that regulate and grant cities the authority to regulate tow truck businesses. *See* Cal. Vehicle Code §§ 21100(g), 22650, 22651.1, 22658(k), 22658(l)(1)-(l)(3), 22658.1, 22850.5.

After the district court entered judgment in favor of Tocher, the City filed a motion to amend the judgment and SAPTA filed a motion to intervene as of right under Rule 24(a) of the Federal Rules of Civil Procedure. The district court denied both motions. SAPTA and the City appeal from the district court's final judgment.

II.

We review the district court's decision denying or granting a motion to intervene as of right de novo. *See League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997); *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 768 (9th Cir. 1997).

SAPTA filed a motion in the district court to intervene as of right under Rule 24(a) after the district court entered its judgment in favor of Tocher and while the City's motion to amend the judgment was pending. The

district court denied SAPTA's motion to intervene, concluding that SAPTA failed to demonstrate that its interests were inadequately represented by the City.

An applicant can intervene as of right under Rule 24(a) of the Federal Rules of Civil Procedure if (1) the motion to intervene is timely filed; (2) the applicant has a 'significantly protectable' interest that is related to the property or transaction which is the subject of the action; (3) the applicant is situated so that the disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and (4) the applicant's interests are inadequately represented by the parties to the action. *Californians for Safe and Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 1377 (1999). To determine whether an applicant's motion to intervene is timely filed, we examine: "(1) the stage of the proceeding at which the applicant seeks to intervene; (2) the prejudice to the other parties; and (3) the reason for and length of the delay." *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 719 (9th Cir. 1994).

Although SAPTA filed its motion after the district court entered its final judgment in favor of Tocher, SAPTA's motion was timely filed. A post-judgment motion to intervene is generally considered timely if it is filed before the time for filing an appeal has expired. *See id.* SAPTA filed its post-judgment motion to intervene while the City's motion to amend the judgment was pending. The motion was therefore timely since the time for filing an appeal had not yet expired. In addition, Tocher was not prejudiced by SAPTA's post-judgment motion because SAPTA attempted to intervene before the

litigation in the district court was complete and presented essentially the same legal arguments as the City. SAPTA also has a good reason for its late intervention because the district court's preliminary injunction did not affect the City's rotational tow list and because it only became apparent after the district court issued its final judgment that the City had failed to adequately represent SAPTA's interests.

Whether SAPTA satisfies the second, third, and fourth requirements of Rule 24(a) is controlled by *Mendonca*. In *Mendonca*, Californians for Safe and Competitive Dump Truck Transportation sued the California Department of Transportation, alleging that section 14501(c) preempted the California prevailing wage law. *See Mendonca*, 152 F.3d at 1185. This Court concluded that the International Brotherhood of Teamsters satisfied the requirements of Rule 24(a) and had the right to intervene because: (1) the motion to intervene was timely filed; (2) the members of the Teamsters had a significant interest in receiving the prevailing wage that was the subject of the lawsuit; (3) a finding of preemption would impair the members' right to receive the prevailing wage; and (4) the California Department of Transportation could not adequately represent the narrow and parochial interests of the Teamsters. *See id.* at 1190.

Like the Teamsters in *Mendonca*, SAPTA satisfies the requirements of Rule 24(a) because: (1) its motion was timely filed; (2) its members have a significant interest in participating in the rotational tow list and the list is the subject of this litigation; (3) if Tocher prevails, the members of SAPTA will not be able to participate in the rotational tow list as it currently functions; and (4) the

City might not adequately represent SAPTA's interests in preserving the rotational tow list. Because SAPTA satisfies the four requirements under Rule 24(a), the district court erred when it denied SAPTA's motion to intervene. We therefore reverse the district court's order and grant SAPTA's motion to intervene.

III.

We review a district court's decision regarding federal preemption and the interpretation and construction of a federal statute de novo. *See Mendonca*, 152 F.3d at 1186 (9th Cir. 1998); *Alexander v. Glickman*, 139 F.3d 733, 735 (9th Cir. 1998); *Waste Action Project v. Dawn Mining Corp.*, 137 F.3d 1426, 1428 (9th Cir. 1998).

Under the Supremacy Clause of the United States Constitution, the laws of the United States are "the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Issues of federal preemption arising under the Supremacy Clause, however, "start with the assumption that the historic police powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Congressional intent, therefore, is the " 'ultimate touchstone' of preemption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

Federal preemption occurs when: (1) Congress enacts a statute that explicitly preempts state law; (2) state law

actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field. *See Cipollone*, 505 U.S. at 516. When, however, Congress adopts a statute that provides a reliable indication of Congressional intent regarding preemption, the scope of federal preemption is determined by the statute. *See id.* at 517. "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Id.* Because Congress expressly adopted a preemption statute in the FAAA and that statute provides a reliable indication of Congressional intent, the preemption issue in this case must be resolved by determining whether the FAAA's preemption provision encompasses the City's ordinances regulating automobile towing operations.

In 1994, Congress enacted the FAAA in order to deregulate the motor carrier industry. To achieve the nationwide deregulation it desired, Congress included the following broad preemption statute in the FAAA:

> (c) Motor carriers of property. –
>
> > (1) General rule. – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of two or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight

forwarder with respect to the transportation of property.

(2) Matters not covered. – Paragraph (1) –

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

. . .

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) State standard transportation practices. –

(A) Continuation. – Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to –

> (i) uniform cargo liability rules,
>
> (ii) uniform bills of lading or receipts for property being transported,
>
> (iii) uniform cargo credit rules,
>
> (iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or
>
> (v) antitrust immunity for agent-van line operations (as set forth in section 13907),
>
> . . .

49 U.S.C. § 14501(c).

Under 49 U.S.C. § 14501(c), a state or local law is preempted if: (1) the law is related to a price, route, or service of any motor carrier with respect to the transportation of property and (2) the law is not saved from preemption by one of the regulatory exceptions in sections 14501(c)(2) or (c)(3).

A.

For a state or local law to be preempted by section 14501(c), that law must first be related to the price, route, or service of a motor carrier that transports property. A state or local regulation is related to the price, route, or service of a motor carrier if the regulation has more than an indirect, remote, or tenuous effect on the motor carrier's prices, routes, or services. *See Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1188-89 (9th Cir. 1998). The ordinances in SAMC heavily

regulate how towing companies operate their businesses. The comprehensive permit scheme, *see* SAMC §§ 32-81 to 32-92; 32-99 to 32-100, prevents companies and tow truck drivers from entering the towing industry if they are unable to comply with the stringent guidelines governing the application and approval process. These requirements include, among others, the tender of valid proof of insurance to the chief of police, *see id.* § 32-91, and a yard for storing vehicles that is adjacent to the business location of the company. *See id.* § 32-92. Applicants may be denied a permit if they fail to comply with any provision in SAMC. Thus, the permit scheme erects barriers to entry and these barriers can affect competition for towing services in the City. *See Mendonca*, 152 F.3d at 1189 (recognizing that a law would be preempted under section 14501(c)(1) if it "frustrates the purpose of deregulation by acutely interfering with the forces of competition"). The more applicants that are denied permits, the greater the effect on both the industry and its customers.

In addition, the ordinances regulating the operations of towing businesses, including restrictions on the rates charged for towing services, *see id.* § 32-98, advertising, *see id.*, business hours, *see id.* § 32-97, and the various detailed requirements governing the transaction between a customer and a towing business, *see id.* §§ 32-93 to 32-96, also directly affect the price, route, or service of a motor carrier. These operating requirements not only have the indirect effect of raising costs, but also directly influence the relationship between a customer and a towing business. Furthermore, the violation of any provision in SAMC can result in the revocation or suspension of a

towing permit, thereby diminishing the number of towing businesses operating and further reducing the competition for towing services in the City. *See* SAMC §§ 32-84 to 32-90. Indeed, the permit scheme and the provisions governing the conduct of towing operators have more than an indirect, tenuous, or remote effect on towing services and prices and are, therefore, expressly preempted by 49 U.S.C. § 14501(c)(1), unless an exception applies.

The California statutes enjoined by the district court also have more than an indirect, tenuous, or remote effect on the prices, routes, or services of a towing company. Sections 22651.1 and 22658(k) of the California Vehicle Code require towing companies to accept certain kinds of payment. Sections 22650, 22658(l), and 22658.1, regulate the removal of vehicles from private property. Finally, sections 21100(g) and 22850.5 grant local governments the authority to regulate towing businesses. These statutes, like the City's ordinances, regulate how a company provides towing services and are accordingly preempted absent the applicability of an exception. The conclusion that the City's ordinances and the California statutes are "related to a price, route or service of any motor carrier . . . with respect to transportation of property" is supported not only by the plain language of 49 U.S.C. § 14501(c)(1), but is also validated by the text of section 14501(c)(2)(C). Section 14501(c)(2)(C) exempts from preemption any laws "relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without [the] prior consent . . . of the

owner."[1] By creating an exception for state or local regulation of the price of non-consensual towing services after the original preemption statute was enacted, Congress reiterated its intent to preempt all state or local laws regulating other aspects of towing services (related to prices, routes, or services) that are not subject to the exception. *See R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 543 (11th Cir. 1998); *Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F. Supp. 711, 712 (S.D. Tex. 1996).

Our reading of section 14501(c)(1) is also closely aligned with the purpose and history behind the preemption statute. Section 14501(c) was adopted by Congress in order to deregulate the motor carrier industry. *See Mayer*, 158 F.3d at 546; *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 772 (2d Cir. 1999). In passing the exception for regulation of nonconsensual towing codified in section 14501(c)(2)(C), Congress acknowledged that states and localities should only be permitted to regulate towing services under limited circumstances. *See Mayer*, 158 F.3d at 546. Congress recognized that widespread disparate regulation of the motor carrier industry was inefficient, increased costs, and reduced competition and innovation. *See id.* (quoting H.R. Conf. Rep. 103-677, at 87 (1994)). One House Conference Report stated: "The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to

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[1] This exception does not save SAMC because the permit scheme and the ordinances governing the operations of a towing business have an effect on the prices and services of *both* non-consensual and consensual tows.

conduct a standard way of doing business." *See* H.R. Conf. Rep. 103-677, at 87.

Allowing each state and local government to enact diverse laws regulating the towing industry would implicate the same evils that Congress was seeking to cure in enacting section 14501(c). Congress recognized that dispersing regulatory authority over motor carriers would require a towing company to adhere to a multitude of different regulatory schemes in every locality where it conducted business and virtually destroy any opportunity for companies to maintain national or even regional standards for conducting business. Therefore, a finding that towing businesses are expressly covered under section 14501(c)(1) also furthers the Congressional purpose of deregulating the motor carrier industry.

Finally, all three circuits that have considered the preemptive scope of section 14501(c)(1) have concluded that state or local laws regulating towing services are subject to that provision. *See Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 691 (5th Cir. 1999) (recognizing that the regulation of towing companies falls under the express language of section 14501(c)(1), but that a rotational tow list is permissible under the market participant exception to preemption); Ace, 171 F.3d at 774 ("[T]he broad 'related to' language of section 14501(c)(1) generally preempts economic regulation by the states within the field of intrastate towing."); *Mayer*, 158 F.3d at 543 ("[U]nder the plain, ordinary meaning of the terms used in § 14501(c)(1), the federal statute expressly preempts state and municipal ordinances that regulate prices, routes, or services provided by towing companies.").

In sum, the permit scheme and the provisions governing the conduct of towing operators in SAMC and the related provisions of the California Vehicle Code are preempted by the plain language of section 14501(c)(1), unless an exception applies.

B.

The next issue is whether the rotational tow list, *see* SAMC § 32-107, falls under the general preemption rule in section 14501(c)(1). Although the plain language of the statute would appear to encompass a rotational tow list, it is saved from preemption by the municipal- proprietor exception (also called the market participant exception) to the preemption doctrine. *See Dillingham Construction N.A., Inc. v. County of Sonoma*, 190 F.3d 1034, 1037 (9th Cir. 1999); *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1062 (9th Cir. 1987). The key inquiry under the municipal-proprietor exception is whether the City is acting in a regulatory or proprietary capacity. *See Shell Oil*, 830 F.2d at 1062. In analyzing this exception, it is vital to examine the substance of the transaction because "a city may not use the guise of privity of contract to conduct otherwise forbidden regulatory activity." *Id.*

SAPTA argues that the rotational tow list is basically a contractual relationship between the City and member towing companies, thereby implicating the municipal-proprietor exception to preemption. SAMC section 32-107 authorizes the Santa Ana chief of police to create written rules and regulations governing the creation and maintenance of a rotational tow list. The purpose of the provision is "to provide a workable and comprehensive policy

regarding the towing and/or storage of abandoned, disabled, stored or impounded vehicles from public or private property." *See* SAMC § 32-107. By its express terms, section 32-107 applies only to nonconsensual tows. The provision, therefore, governs only the relationship between the City and towing companies selected to the rotational tow list and was established in order to create a reliable list of towing companies who could render quick and efficient towing services for the City. Under these circumstances, the rotational tow list is the classic example of a municipality acting as a market participant; the City is merely establishing rules and regulations to guide the formation of contracts for towing services provided exclusively to the City. Unlike the permit guidelines and the regulations governing the operation of towing companies, section 32-107 in no way affects the relationship between towing companies and the general public. The limited scope of section 32-107, covering only contracts between the City and towing companies, is not a veiled attempt to regulate the motor carrier industry and is, therefore, not preempted by section 14501(c)(1).

This conclusion is consistent with the Fifth Circuit's opinion in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999). *Cardinal Towing* considered whether, during the bidding process for a contract to provide non-consensual towing services, a city's decision to require the satisfaction of certain requirements by the winning bidder was preempted by section 14501(c)(1). In concluding that it was not, the court stressed that the specifications listed in the municipal ordinance governed only the contract between the towing company and the municipality and had no effect on the

general public. *See id.* at 694. The court recognized that the municipality was not doing anything other than "setting specifications that would insure the efficient performance of the contract with the City for City police tows." *Id.* In addition, as in this case, the court also noted that the contract specifications applied only to contracts for towing services – that is, a single job – and did not apply to the provision of other services such as those performed by a moving company. *See id.*

Although the ordinance in *Cardinal Towing* did not involve a rotational tow list because the municipality was seeking a single provider of towing services, the analysis is identical where, as here, multiple towing companies are being solicited to become part of a rotation system. Regardless of whether an ordinance encompasses a single company or several companies, any system that regulates the provision of towing services solely to a city, and affects only the relationship between a city and towing companies, falls under the municipal-proprietor exception that has repeatedly been applied in preemption cases.

Importantly, the Fifth Circuit also recognized in *Cardinal Towing* that application of the municipal-proprietor exception is consistent with the text of section 14501(c). The court first acknowledged that the text of section 14501(c)(1) is nearly identical to the text of 29 U.S.C. § 1144(a), the ERISA preemption statute. *See id.*; *see also* 29 U.S.C. § 1144(a) (preempting any state law "as they may nor or hereafter relate to any employee benefit plan"); 29 U.S.C. § 1144(c)(1) (defining a state law as "all laws, decisions, rules, regulations, or other State action having the effect of law."). Since courts "have had little difficulty

finding that proprietary action does not 'have the effect of law' under ERISA," the court in *Cardinal Towing* was persuaded that there was no logical reason for limiting the exception to cases arising under the NLRA or ERISA. *See id.* While conceding that no court had ever considered whether the municipal-proprietor exception applies to section 14501(c), the court nevertheless found that "[n]ot only does the text of the statute allow for a proprietary analysis, by excluding government actions without the force of law it seems to invite it." *See id.* at 695.

In addition, because section 14501(c) was uniquely designed to encourage the deregulation of the motor carrier industry, allowing a municipality to act as a private consumer of towing services is entirely consistent with that purpose. The creation of a rotational tow list allows a city to contract with the party who is able to deliver the most inexpensive, efficient, and reliable towing services by acting as any other private consumer would in a competitive market. *See id.* Therefore, under the municipal-proprietor exception, section 32-107 of SAMC is not preempted.

Section 32-107 of SAMC requires all members of the rotational tow list to hold towing operation permits and any failure to abide by the rules governing the rotational tow list can lead to the revocation or suspension of a permit. Since we have already concluded that the SAMC permit scheme is preempted, a requirement that a member of the rotational tow list hold a permit is similarly preempted. Because SAMC contains a severability clause, *see* SAMC § 1-5, however, and section 32-107 can function effectively despite partial invalidation, there is no need to strike down the rotational tow list in its entirety. *See*

Edwards v. City of Santa Barbara, 150 F.3d 1213, 1217 (9th Cir. 1998); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 250 (9th Cir. 1988). Rather, the City is free to continue using the rotational tow list, but cannot enforce any rules relating to permits.

C.

As a final attempt to save the permit scheme and the guidelines governing the conduct and operations of towing businesses from preemption, *see* SAMC §§ 32-81 to 32-106, the City argues that the exception contained in 49 U.S.C. § 14501(c)(2)(A) applies. That section provides that the general preemption provision in section 14501(c)(1) "shall not restrict the safety regulatory authority *of a State* with respect to motor vehicles . . . or the authority of a State to regulate motor carriers with regard to the minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." 49 U.S.C. § 14501(c)(2)(A) (emphasis added). The City argues that its ordinances are not preempted because they are safety regulations under section 14501(c)(2)(A) and they were enacted pursuant to an express delegation of the State's authority to municipalities across California. *See* Cal. Veh. Code § 21100. The City's argument fails because section 14501(c)(2)(A) only exempts safety regulations promulgated by state governments, not those enacted by municipalities.

As an initial matter, there is disagreement among federal courts about whether states may delegate their regulatory authority under the safety exception to municipalities, so there is not much uniform guidance on this

issue. *Compare R. Mayer*, 158 F.3d at 545 to *Ace*, 171 F.3d at 774-75. The term "State" under the FAAA is defined as "the 50 States of the United States and the District of Columbia," *see* 49 U.S.C. § 545, and a plain reading of this provision indicates that municipalities are not included within that definition. In contrast to the general preemption provision and several of the exceptions, section 14501(c)(2)(A) only allows *states* to enact safety regulations. For example, the non-consensual towing exception, *see* 49 U.S.C. § 14501(c)(2)(C), expressly mentions that political subdivisions of states may regulate the prices charged for non-consensual towing services. Indeed, as *Mayer* points out, section 14501 contains no less than seven references to the regulatory authority of political subdivisions, but is conspicuously silent in section 14501(c)(2)(A). *See Mayer*, 158 F.3d at 545. "In fact, § 14501(c)(2)(A) is the only subsection of the statute that mentions the regulatory authority of a state without also mentioning the regulatory authority of the state's political subdivisions." *Id.* The most logical conclusion, therefore, is that this omission was intentional and that Congress did not intend to allow municipalities to escape preemption by enacting safety regulations. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

There are two other reasons to adhere to a strict construction of section 14501(c)(2)(A). First, a strict reading furthers the policy of deregulation underlying the enactment of section 14501. Allowing both states and

municipalities to escape preemption under the guise of regulating safety could lead to widespread, diverse regulation of motor carriers, precisely what Congress sought to avoid in promulgating a broad preemption statute. *See Mayer*, 158 F.3d at 546. Second, a contrary reading of the safety exception would lead to the absurd result that Congress can never preempt local regulations and simultaneously leave a state's ability to regulate intact. If this Court were to hold that a state can always delegate its responsibility to municipalities, Congress would always be required to preempt both state and local laws, or preempt neither. That result would violate fundamental principles of federalism and lead to a distorted interpretation of the Supremacy Clause.

In light of the plain language of section 14501(c)(2)(A) coupled with the Congressional purpose in enacting the preemption statute, we conclude that for section 14501(c)(2)(A) preemption purposes, a state may not delegate its regulatory authority to a municipality. Accordingly, the safety exception in section 14501(c)(2)(A) does not save the provisions of SAMC covered by the general preemption rule of section 14501(c)(1).

Section 14501(c)(2)(A), however, still excepts from preemption any regulations implicating the "safety regulatory authority of a State with respect to motor vehicles." Sections 22650 and 22658.1 of the California Vehicle Code, governing the removal of vehicles from private property, escape preemption under this exception. Section 22650 prohibits a police officer (or any other unauthorized person) from removing any unattended vehicle without strict compliance with the Vehicle Code.

Section 22658.1 requires a towing company to notify a property owner if it was necessary to cut, remove, or damage a fence in order to remove a vehicle. Each of these provisions is designed to make the towing and removal of vehicles safer by insuring that only professionals tow vehicles and that the removal does not endanger the general public or the owner of the property where the vehicle was removed. As a result, both statutes escape preemption under 49 U.S.C. § 14501(c)(2)(A). The other provisions in the California Vehicle Code that were enjoined by the district court, *see supra*, are preempted because they are based on consumer protection rather than safety, and the safety exception is therefore inapplicable.

IV.

SAPTA's final contention on appeal is that Congress exceeded its authority under the Commerce Clause in promulgating 49 U.S.C. § 14501. Section 14501 preempts state or local regulation of motor carriers. This court has previously recognized that automobiles are instrumentalities of commerce even when used solely for intrastate purposes. *See United States v. Randolph*, 93 F.3d 656, 660 (9th Cir. 1996).[2] That view seems to be shared universally among federal courts. *See, e.g., United States v. Cisneros*, 203 F.3d 333, 340 n. 4 (5th Cir. 2000) (cataloging

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[2] *Randolph*'s analysis regarding the Commerce Clause is still good law because the Supreme Court abrogated only *Randolph*'s conclusions regarding the intent requirement under the federal carjacking statute. *See United States v. Hicks*, 103 F.3d 837, 848 (9th Cir. 1996).

federal case law on whether an automobile is an instrumentality of commerce). Because a motor carrier is defined under the FAAA as "a person providing motor vehicle transportation for compensation," *see* 49 U.S.C. § 13102(12) (emphasis added), section 14501 is within Congress' Commerce power because it regulates an instrumentality of commerce.

V.

In sum, we make only the following modifications to the permanent injunction issued by the district court: (1) The City is free to continue its rotational tow list under the provisions of SAMC section 32-107, however, the underlying permit requirements are preempted and are not enforceable; and (2) Sections 22650 and 22658.1 of the California Vehicle Code may continue to be applied because they are not preempted. In addition, we reverse the district court's denial of SAPTA's motion to intervene.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each party shall bear their own costs.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

PATRICK P. TOCHER, an individual; PATRICK P. TOCHER dba PACIFIC COAST MOTORING, a sole proprietorship, Plaintiffs, v. THE CITY OF SANTA ANA and Chief of Police, PAUL WALTERS, Defendants.	SA CV 95-224 AHS (EEx) JUDGMENT AND PERMANENT INJUNCTION (Filed Dec. 30, 1996)

This action came on for trial before the Court on July 19, 1996, the Honorable Alicemarie H. Stotler, District Judge, presiding, and the issues having been duly tried, the Court's Findings of Fact and Conclusions of Law having been made, and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that:

1. Plaintiff shall have judgment against defendant, judgment shall be entered in favor of plaintiff, and plaintiff shall recover his costs of this action.

2. The City of Santa Ana, and Chief Paul Walters, and their agents, servants, and employees, and all persons acting in concert with them, are hereby permanently enjoined from enforcing any laws, rules, regulations,

and/or provisions having the force and effect of law which relate to the price, route, or services of (i) tow truck businesses and operations, and/or (ii) individuals engaged in tow truck businesses and operations as principals or employees of the business. Specifically, defendants are enjoined from enforcing any laws pursuant to or in furtherance of the following: Santa Ana Municipal Code §§ 32-81 through 32-107, and California Vehicle Code §§ 21100(g) 22650, 22651.1, 22658(k) and (1)(1), (2), and (3), 22658.1, and 22850.5.

As used in this Order, tow truck operations means consensual and non-consensual motor vehicle transportation by a motor vehicle designed to pull or carry other vehicles. A tow truck business includes tow truck operations, operation of a storage yard, storage of towed vehicles, and all activities necessary and incident to the foregoing. A consensual tow is motor vehicle transportation with the consent or authorization of the owner or operator of the vehicle; a non-consensual tow is a tow without such consent.

This Order does not restrict the City of Santa Ana from enforcing state laws, rules, and provisions having the force and effect of law which: 1) regulate the safety of motor vehicles; 2) impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo; or, 3) which regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization. This Order also does not apply to the authority of Santa Ana to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow

truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve this Judgment and Permanent Injunction on counsel of record for all parties in the action.

Dated: December 30, 1996.

/s/ Alicemarie H. Stotler
ALICEMARIE H. STOTLER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

PATRICK P. TOCHER, an individual; PATRICK P. TOCHER dba PACIFIC COAST MOTORING, a sole proprietorship, Plaintiffs, v. THE CITY OF SANTA ANA and Chief of Police, PAUL WALTERS, Defendants.	SA CV 95-224 AHS (EEx) ORDER MODIFYING AND ADOPTING AS MODIFIED PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Dec. 30, 1996)

The above-captioned matter was tried to the Court on July 19, 1996. Eric B. Kaminsky, Esq., appeared on behalf of plaintiff Patrick P. Tocher, individually and dba Pacific Coast Motoring, ("plaintiff") and Robert J. Wheeler, Esq., Assistant City Attorney of Santa Ana, appeared on behalf of defendant City of Santa Ana and its Chief of Police, Paul Walters ("defendant").

After consideration of the entire record in this matter, the legal authorities cited to the Court by counsel for the parties, the arguments of counsel thereon, and subsequent independent research, the Court now modifies, augments, and, as modified, files the Findings of Fact and Conclusions of Law lodged by plaintiff on July 8, 1996.

The Court concludes that plaintiff is entitled to a permanent injunction against enforcement by defendant of the Santa Ana Code §§ 32-81, et seq., and California Vehicle Code §§ 21100(g), 22650, 22651.1, 22658(k) and (l), 22658.1, and 22850.5, for the reasons shown in the attached two-page Appendix and as set forth in the Findings of Fact and Conclusions of Law.

Certain of the proposed Findings have been deleted, shown by strike-outs on plaintiff's proposed Findings of Fact and Conclusions of Law, due to the court's finding that specific provisions of the California Vehicle Code at issue are saved from preemption on the grounds that they (1) fall within the statutory exception permitting the regulation of the price of non-consensual for-hire motor vehicle transportation by a tow truck, and/or (20 do not relate to the provision of towing services. 49 U.S.C. §§ 14501(c)(1) and (2)(C).

The sections of the California Vehicle Code, placed in issue by the Pretrial Conference Order, found **not preempted**, are:

1. Sections 22658(h), (i), and (j), relating to the permissible regulation of the rates imposed for non-consensual towing; and,

2. Section 22658.2, authorizing a common interest development to prohibit parking of non-authorized vehicles and to order their removal from the development. This section does not relate to the price, route, or services of tow truck businesses.

The aforementioned sections of the California Vehicle Code are therefore not preempted by federal law and

Santa Ana is not restrained from enforcing their provisions.

On October 16, 1996, plaintiff supplied a copy of the order issued by the Southern District of Texas in a case entitled *A & A Wrecker Service, Inc., et al., v. City of Galveston,* No. G-95-111 (S.D. Tex. filed June 10, 1996), which order by Magistrate Judge John R. Froeschner accurately and well discusses the circumscribed scope of local regulation by political subdivisions over towing truck operators and their operations. The Court must agree with the reasoning expressed in the decision, and it is hereby made a part of the Court's Conclusions of Law.

The Court grants judgment for plaintiff.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order and the Findings of Fact and Conclusions of Law, as modified, on counsel for all parties in this action.

Dated: December 30, 1996.

/s/ Alicemarie H. Stotler
ALICEMARIE H. STOTLER
UNITED STATES
DISTRICT JUDGE

SANTA ANA MUNICIPAL CODE

Valid?	#32-	Description	Reason Valid/Invalid per § 14501
-	81	Definitions	Merely a definitional section
No	82	Permit Req'd	Requires a permit - prohibited because permit is a precondition for providing service
No	83	--Application/fee	Regulates receiving a permit, therefore regulates service
No	84	--Denial of permit	Regulates receiving a permit
No	85	--Notice of denial	Regulates receiving a permit
No	86	--Suspension of permit	Regulates receiving a permit
No	87	--Grounds to suspend	Regulates receiving a permit
No	88	--Add'l grounds	Regulates receiving a permit
No	89	--Hrg on denial	Regulates receiving a permit
No	90	--Reapplication	Regulates receiving a permit
No	91	--Need insurance	Regulates receiving a permit
No	92	Business location must be approved before permit issues	Regulates receiving a permit
No	93	Towing authoriz.	Regulates service of towing
No	94a	Notify police re tow	Safety reg, but only state can regulate safety
No	94b	Tow operator collect logging fee for police	Requires collection of fee to provide service
No	95	Provide itemized stmnt	Requirements before service can be provided
No	96	When permittee can make repairs	Regulates service a permittee can provide
No	97	Times for car release	Regulates providing service
No	98a	Sign re: charges	Regulates providing service
No	99b	File a rate schedule	Regulates receiving a permit
No	99	Must have permit tow	Regulates providing service
No	100	Must carry id card reflecting permit	Regulates providing service
No	101	No transfer of permits	Regulates receiving a permit
No	102	Transfer if buy business	Regulates receiving a permit
No	103	--Fee for transfer	Regulates receiving a permit
No	104	--Action on appl.	Regulates receiving a permit
No	105	Permit for each location	Regulates providing a service
No	106	Change permit location	Regulates receiving a permit
No	107	Rotate permittees called re: a tow	Regulates providing a service, depends upon permit system
-	108	Reserved	

CALIFORNIA VEHICLE CODE*

*A = § 21100(g); B = § 22650; C = § 22651.1; D = § 22658(h); E = § 22658(i); F = § 22658(j); G = § 22658(k); H = § 22658(l)(1), (2) & (3); I = § 22658.1; J = § 22658.2; K = § 22850.5.

Valid?	VC#	Description	Reason Valid/Invalid per § 14501
No	A	City can license and reg. tow truck co.'s	Permits invalid regulation of service
No	B	Can only tow unattended vehicles pursuant to code	Defines who can provide service
No	C	Must accept credit card and have sufficient change for towing	Regulates providing a service
Yes	D	Charge only ½ if owner returns before towed	Permissibly relates to rate regulation
Yes	E	Excessive rates for towing and storage	Permissibly relates to rate regulation
Yes	F	Fine for excessive fees	Permissibly relates to rate regulation
No	G	Must accept credit card and have sufficient change for storage	Regulates providing a service
No	H	Need permission from property owner, take picture if too close to fire lane	Regulates providing a service
No	I	Damage or open a fence while towing must notify owner or police	May relate to "safety" but not as defined by §14501(2)(C)
Yes	J	Removal from common interest development	Does not regulate towing, regulates ability of development to order removal
No	K	Procedures for release and charges for removal and storage of towed cars	Allows regulation of service

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PATRICK P. TOCHER, an individual; and PATRICK P. TOCHER dba PACIFIC COAST MOTORING, a sole proprietorship, Petitioners, vs. THE CITY OF SANTA ANA, THE CITY OF TUSTIN, THE CITY OF COSTA MESA, all California Municipalities; Chief PAUL WALTERS, THE POLICE DEPARTMENT OF THE CITY OF SANTA ANA; Chief W. DOUGLAS FRANKS, THE POLICE DEPARTMENT OF THE CITY OF TUSTIN; Chief DAVID SNOWDEN, THE POLICE DEPARTMENT OF THE CITY OF COSTA MESA, Respondents.	CASE NO. SACV-95-224-AHS (EEX) **PETITIONER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** Honorable Alicemarie H. Stotler United States District Court Judge (Filed Dec. 30, 1996) TRIAL DATE: July 16, 1996 TIME: 9:00 a.m. COURTROOM: 1 [All strikeouts beginning at App. 40 were initialed by "AHS" (Hon. Alicemarie H. Stotler) and all interlineations in original were handwritten].

Petitioner Patrick P. Tocher, etc., et al, hereby submits his PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW pursuant to Rule 13.5 and order of the court.

A. FINDINGS OF FACT

1. Petitioner is an individual and at all relevant times has been and is doing business as Pacific Coast Motoring, a sole proprietorship. He employs agents, servants, and employees in his business. At all times relevant, Plaintiff has been and is in the activity, business, and/or enterprise of for-hire movement of motor vehicles by using tow trucks to move the vehicles. "Tow trucks" include vehicles designated for pulling other vehicles and vehicles that carry other vehicles ("flatbed carriers"). He also has a storage yard where he stores towed vehicles until they are retrieved by their owners. His towing business is within the city limits of respondent City of Santa Ana and within other cities, both contiguous and non-contiguous, and the County of Orange, State of California, in both contiguous and non-contiguous areas of said County, and he and his agents, servants, and employees do towing within the aforementioned areas. In addition to towing and storage, he and his agents, servants and employees do other activities incident to towing and storage, such as administering the storage yard, collecting towing fees and storage charges, and releasing vehicles to the owner or other person entitled to take possession of the vehicles. Plaintiff's towing business does not include the following:

a. Providing towing to anyone without charge or fee.

b. Providing towing on a non-profit basis, and he does not provide towing pursuant to a rental or lease agreement or contract.

2. Respondents are the City of Santa Ana ("City") and Paul Walters, who at all times relevant was and is the Chief of Police of the City of Santa Ana (collectively "Respondents").

3. Each of the parties has been served and has appeared. All other parties named in the pleadings and not identified in the preceding paragraph [Court's interlineation: have] been dismissed.

4. Respondent City of Santa Ana is a Charter City established and exercising its rights, powers and duties under and pursuant to Article 11, sections 3, 5, and 7 of the California Constitution, and, inter alia, the California Government Code and the California Vehicle Code.

5. Defendant Paul Walters is the Chief of Police of the Police Department of the City. His duties at all times relevant, include, on behalf of the City, enforcing all City Ordinances and the laws, rules, and regulations of the State of California. He does this through the City police department. The City police department is part of the City government and not a separate public agency or entity. Defendant Walters is a party to this action in his capacity as Chief of Police of the Police Department of the City of Santa Ana.

6. Prior to the filing of this action, the City enacted into law a comprehensive ordinance which consists of

sections 32-81 through 32-107 of the Santa Ana Municipal code ("Tow Truck Ordinance"). The Tow Truck Ordinance was enacted pursuant to the City's Charter, Government Code section 37100 and Vehicle Code sections 21100(g) and 22850.5. The Tow Truck Ordinance includes provisions which relate to all aspects of the towing business and includes both consensual and non-consensual tows, provided, however, no ordinance sets the price that can be charged for non-consensual tows. The Tow Truck Ordinance at all relevant times is and has been in effect. The Respondents at all times relevant enforced the Tow Truck Ordinance against the Plaintiff and, unless restrained by the court, the Respondents intend to continue to enforce its Tow Truck Ordinance against all persons, including Plaintiff and his agents, servants, and employees, who are engaged in the activity, business or enterprise of providing for-hire movement of motor vehicles by tow truck within the City limits, including the storing of vehicles and all other activities incident to towing.

7. The State of California has enacted into law California Vehicle Code sections 21100(g), 22650, 22651.1, 22658, 22658.1, 22658.2, and 22850.5. These statutes at all relevant times are and have been in effect and include provisions which relate to and regulate, and/or give local government entities authority to regulate, inter alia, persons and businesses who for hire move motor vehicles from one place to another by tow truck. No state statute sets the price to be charged for non-consensual tows. The respondents have enforced the Vehicle Code sections against the petitioner and, unless restrained by the court,

the respondents intend to continue to enforce these statutes against all persons, including petitioner, who are in the towing business.

8. At all times relevant, petitioner does and has done and intends to continue doing both consensual and non-consensual towing, including storage of vehicles towed in both instances. Consensual towing is the towing of a vehicle with the prior consent or authorization of the owner or operator of the vehicle being towed. Non-consensual towing is the towing of a vehicle without the prior consent or authorization of the owner or operator of the vehicle being towed. A substantial part of tows and towing services performed by the plaintiff involve non-consensual tows. An example of a non-consensual tow performed by the Plaintiff is the removal of a motor vehicle illegally parked on private property at the behest of the property owner and without the prior consent of the owner of the illegally parked vehicle.

9. Pursuant to SAMC 32-94 [Court's interlineation: (a)], petitioner or his agents, servants, and employees, after moving a vehicle, notifies the City's police department that he is removing an illegally parked motor vehicle from private property. This is to insure notification, as required by the ordinance. Also pursuant to SAMC 32-94 [Court's interlineation: (b)], the City has established a fee to defray the cost of police department's logging and creating computer entries for vehicles towed from private property. This logging is done so that the police department can advise a vehicle owner who inquires about the whereabouts of his vehicle that the vehicle has been towed and not stolen. As required by the

ordinance, petitioner collects the fee from the towed vehicle's owner.

10. Petitioner and his agents, servants, and employees are persons whose business and activities are governed by the Tow Truck Ordinance and above-described applicable sections of the California Vehicle Code. Petitioner and his agents, servants, and employees, while engaged in towing business activities, have been issued citations, threatened with arrest and threatened with having their tow trucks impounded by the respondents for failure to comply with various sections of the Tow Truck Ordinance and applicable California Law. In these instances, the respondents have also demanded that petitioner and his agents, servants, and employees obtain City permits pursuant to the Tow Truck Ordinance before engaging in the towing business and towing activities within the City limits, as well as demanding that petitioner obtain a permit for his business location/storage yard, and if they fail to obtain the permits, they will be arrested, and have their tow trucks impounded. The respondents' demands are pursuant to and under the authority of the Tow Truck Ordinance and the California Vehicle Code sections cited above. Petitioner and his agents, servants, and employees do not have permits but desire to engage in the towing business within the City limits as well as maintain a principal place of business and storage yard within the City limits.

11. On January 1, 1995, 49 *U.S.C.* §11501 became law. Effective January 1, 1996, 49 *U.S.C.* §11501 was re-enacted, amended, and renumbered 49 *U.S.C.* 14501.

B. FINDINGS OF LAW:

1. On January 1, 1995, 49 *U.S.C.* 11501 became law. On January 1, 1996, 49 *U.S.C.* 11501 was re-enacted, amended and renumbered 49 *U.S.C.* 14501. The re-enacting, amending and renumbering of 49 *U.S.C.* 11501 does not make this action moot.

2. [Court's interlineation: Subject to limited statutorily defined exception [sic],] 49 *U.S.C.* 11501, now 49 *U.S.C.* 14501, pre-empts all laws, rules, [Court's interlineation: regulations] and provisions having the force and effect of law of any state and any political subdivision of a state relating to price, route, or service of any motor carrier or any motor private carrier transporting property.

3. No state or any political subdivision of a state may enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier or motor private carrier with respect to the transportation of property, provided, however, that this restriction does not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a [Court's interlineation: S]tate to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a [Court's interlineation: S]tate to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization. Further, the restriction does not apply to transportation of household goods, and further still, the restriction does

not apply to the authority of a State ~~of~~ [Court's interlineation: or] a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

4. Sections 32-81 through 32-107 of the Santa Ana Municipal Code relate to towing businesses and towing business activities, and includes the agents, servants, and employees of such businesses who engage in towing activities. Sections 32-81 through 32-107 of the Santa Ana Municipal Code ~~was~~ [Court's interlineation: were] enacted pursuant to the City's Charter, Government Code §37100 and *Vehicle Code* §§21100(g), and 22850.5. Sections 32-81 through 32-107 are enactments of a political subdivision [Court's interlineation: of a State] and not ~~a~~ [Court's interlineation: of] a state.

5. *California Vehicle Code* §§21100(g), 22650, 22651.1, 22658 (h), (i), (j), and (k), 22658 (l)(1), (2), and (3), 22658.1, 22658.2, and 22850.5 relate to towing business and towing activities and includes the agents, servants and employees of such business who engage in towing activities.

6. Defendant City of Santa Ana is a Charter City established and exercising its rights, powers and duties under and pursuant to Article 11, sections 3, 5, and 7 of the California Constitution, and, *inter alia,* the *California Government Code* and the *California Vehicle Code.*

7. The City is a political subdivision of the State of California under 49 *U.S.C.* 14501.

8. The Plaintiff is a motor carrier or motor private carrier under 49 *U.S.C.* 14501.

9. All provisions of the Santa Ana Municipal Code's Tow Truck Ordinance relates to price, route, or service of towing businesses and activities under 49 *U.S.C.* 14501 and contains no sections exempted from 49 *U.S.C.* 14501. Further, said provisions are enactments or [Court's interlineation: a] ~~a~~political subdivision and not a state.

10. *California Vehicle Code* §§21100(g), 22650, 22651.1, 22658 ~~(h), (i), (j), and~~ (k), 22658 (l)(1), (2), and (3), 22658.1, ~~22658.2,~~ and 22850.5 relate to price, route, or service of tow truck businesses and activities and contain no sections exempted from 49 *U.S.C.* 14501.

11. Respondents, pursuant to SAMC 32-94, can impose a fee on the owners of illegally parked vehicles removed from private property by the Plaintiff at the direction of the owner of the property. Respondents may not require that the fee be collected by the Plaintiff and remitted to the City.

12. No provision of the City's Tow Truck Ordinance pertains to safety or insurance requirements under 49 *U.S.C.* §14501(c)(2)(A), except [Court's interlineation: §]§32-91 [Court's interlineation: & 32-94(a)]. Section[Court's interlineation: s] 32-91 [Court's interlineation: & 32-94(a) are] ~~is~~ pre-empted by 49 *U.S.C.* 14501 in that a) as written and enforced ~~it~~ relate to price, route or services and b) [Court's interlineation: are] ~~is~~ local rather than state legislation, and therefore the respondents may not enforce [Court's interlineation: them] ~~it~~ against the petitioner.

13. Petitioner is therefore entitled to an order of the court enjoining and restraining the Respondents and their agents, servants, and employees, and all others acting on their behalf and in their stead from:

a. Enforcing *California Vehicle Code* §§22651.1, 22658 ~~(h), (i), (j), and~~ (k), 22658 (l)(1), (2), and (3), 22658.1, ~~22658.2,~~ and 22850.5 and/or the Santa Ana Municipal Code sections 32-81 through 32-107, against (i) tow truck businesses and operations, and/or (ii) individuals engaged in tow truck businesses and operations as principals or employees of the business except according to the proviso stated hereunder.

b. Enacting and/or enforcing any laws, rules, regulations, ordinances, and/or provisions having the force and effect of law pursuant to *California Vehicle Code* §§21100(g) which enactments relate to price, route, or services of (i) tow truck businesses and operations, and/or (ii) individuals engaged in tow truck businesses and operations as principals or employees of the business except according to the proviso stated hereunder.

c. Enacting and/or enforcing pursuant to *California Vehicle Code* §§22650 any laws, rules, regulations, ordinances, and/or provisions having the force and effect of law relating to prices, routes, or services of (i) tow truck businesses and operations, and/or (ii) individuals engaged in tow truck businesses and operations as principals or employees of the business except according to the proviso stated hereunder.

d. Enacting any laws, rules, regulations and provisions having the force and effect of laws relating to price, route, or services of (i) tow truck businesses and

operations, and/or (ii) individuals engaged in tow truck businesses and operations as principals or employees of the business which enactment is pursuant to, in furtherance of, or to implement or enforce *California Vehicle Code* §§21100(g), 22650, 22651.1, 22658 ~~(h), (i), (j), and~~ (k), 22658(l)(1), (2), and (3), 22658.1, ~~22658.2,~~ and 22850.5 or any other California state law, rule, regulation and provision having the force and effect of law which is currently in effect or later enacted except according to the proviso stated hereunder.

e. Enforcing any California state laws, rules, regulations, and provisions having the force and effect of law, whether or not such are specifically stated in this order, relating to price, route, or services of (i) tow truck businesses and operations, and/or (ii) individuals engaged in tow truck businesses and operations as principals or employees of the business whether such are in effect at this time or may later become effective except according to the proviso stated hereunder.

f. Enacting and enforcing any laws, ordinances, rules, regulations, and provisions having the force and effect of law relating to price, route, or services of (i) tow truck businesses and operations, and/or (ii) individuals engaged in tow truck businesses and operations as principals or employees of the business except according to the proviso stated hereunder.

As used in this order, tow truck operations means consensual and non-consensual motor vehicle transportation by a motor vehicle designed to pull other vehicles ("tow truck") and vehicles that carry other vehicles ("flatbed carriers"). A tow truck business includes tow truck

operations, operation of a storage yard, storage of towed vehicles, and all activities necessary and incident to the foregoing. A consensual tow is motor vehicle transportation with the consent or authorization of the owner or operator of the vehicle; a non-consensual tow is a tow without such consent.

Provided, however, that this order does not restrict the respondents from enforcing state laws, rules and provisions having the force and effect of law which impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or which regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization. Further, this order does not apply to motor carriers who [sic] business is the transportation of household goods, nor does it apply to enactment and/or enforcement of laws, regulations, or other provisions of law relating to the price of for-hire motor vehicle transportation by a tow truck if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

Respectfully submitted:

Dated 7/8/96

/s/ Eric B. Kaminsky
Eric B. Kaminsky,
attorney for Petitioner

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing _____ and know its contents.

[X] CHECK APPLICABLE PARAGRAPH

[ ] I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

[ ] I am [ ] an Officer [ ] a partner _____ [ ] a _____ of _____, a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. [ ] I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. [ ] The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

[ ] I am one of the attorneys for _____, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on _____, 19___, at _____, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Type or Print Name _____ Signature _____

PROOF OF SERVICE
1013A (3) CCP Revised 5/1/88

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the county of Orange, State of California, I am over the age of 18 and not a party to the within action; my business address is: 507 E. First St., Ste. E, Tustin, California 92680

On July 8, 1996, I served the foregoing document described as PETITIONER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW on the interested parties in this action

[X] by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:

[ ] by placing [ ] the original [ ] a true copy thereof enclosed in sealed envelopes addressed as follows:

Robert J. Wheeler
City Attorney's Office
20 Civic Cenrer [sic] Plaza, M-29
PO Box 1988
Santa Ana, CA 92702

[X] BY MAIL

[X] *I deposited such envelope in the mail at Tustin, California.

The envelope was mailed with postage thereon fully prepaid.

[ ] As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at _____ California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on July 8, 1996, at Tustin, California.

[ ] **(BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

Executed on _____, 19___, at _____, California.

[ ] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I. Kaminsky
Type or Print Name

STUART'S EXBROOK TIMESAVER (REVISED 5/1/86)
NEW DISCOVERY LAW 2030 AND 2031 CCP
(May be used at California State or Federal Courts)

/s/ I. Kaminsky
Signature

*(BY MAIL SIGNATURE MUST BE OF PERSON DEPOSITING ENVELOPE IN MAIL SLOT, BOX OR BAG)

**(FOR PERSONAL SERVICE SIGNATURE MUST BE THAT OF MESSENGER)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICK P. TOCHER, an individual, dba Pacific Coast Motoring, Plaintiff-Appellant, v. CITY OF SANTA ANA; PAUL WALTERS, Defendant-Appellee.	Nos. 97-55628/ 97-55660 D.C.# CV-95-00224-AHS Central District of California ORDER (Filed Aug. 31, 2000)

Before: BRUNETTI, RYMER, and SILVERMAN, Circuit Judges

The panel has voted to deny the appellants' petition for rehearing. Judges Rymer and Silverman have voted to deny the appellants' suggestion for rehearing en banc and Judge Brunetti so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and suggestion for rehearing en banc are denied.

SANTA ANA MUNICIPAL CODE*

Chapter 32 VEHICLES FOR HIRE

ARTICLE IV. TOW TRUCKS

Sec. 32-81. "Towing operation" defined.

As used in this article "towing operation" means the activity, business or enterprise of towing vehicles for compensation within the City of Santa Ana. Towing operation includes the storing of vehicles and all other services performed incident to towing. The provisions of this article shall not apply to any towing operation:

(a) That provides tow service exclusively to members of an association, automobile club or similar organization, and receives remuneration only from the sponsoring association, automobile club or similar organization;

(b) That provides tow service without charge or fee for other vehicles owned or operated by the individual or organization furnishing tow service;

(c) That provides tow service for other vehicles owned or operated by the individual or organization furnishing the tow service, but which are being operated under terms of a rent or lease agreement or contract, and such towing is performed on a nonprofit basis or said fee is a part of the rent or lease agreement or contract;

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* This excerpt from the Santa Ana Municipal Code may also be accessed online via http://www.municode.com/

(d) That provides tow service for vehicles in the city on a nonemergency towing assignment. A nonemergency towing assignment includes towing of vehicles that have been involved in a collision, but have been removed from the scene; that have experienced mechanical failure, but have been removed from the roadway and no longer constitute a hazard; or that, being mechanically operative, are towed for convenience. All nonemergency towing assignments require authorization from the registered owner, legal owner, driver, or other person in control of such vehicle.

(Ord. No. NS-1616, § 1, 1-4-82; Ord. No. NS-2159, § 1, 6-15-92)

Sec. 32-82. Permit required.

No person shall engage in, manage, conduct or operate a towing operation business without a written permit from the chief of police. Towing operation permits, issued pursuant to the provisions of this article unless sooner revoked, suspended or canceled, shall be effective for a period of seven (7) years from the date of issuance; and may be renewed for successive seven-year periods of time. Applications for renewal shall be treated as applications for a towing operation permit, subject to all applicable provisions of this article. Applications for renewal, and the appropriate fee, shall be filed with the chief of police not later than thirty (30) days before the expiration of the permit.

(Ord. No. NS-1616, § 1, 1-4-82; Ord. No. NS-2159, § 2, 6-15-92)

Sec. 32-83. Application for permit; fee.

An application for a permit shall be filed with the chief of police on forms furnished by him, shall be accompanied by a fee in an amount established by resolution of the city council, and shall contain the following information:

(a) The name, date of birth, driver's license number, business and residence address of the applicant, if a natural person, or if a corporation, its name, date and place of incorporation, address of its principal officers, together with their respective residence addresses; or if a partnership, association or unincorporated company, the names of the partners, or of the persons comprising such association or company, and the business and residence of each partner or person;

(b) A description of each tow truck or other vehicle proposed to be used by the applicant, together with engine identification numbers and state vehicle license numbers thereon;

(c) The names, date of birth, addresses and driver's license numbers of all tow truck operators employed by the applicant;

(d) The business, occupation, or employment history of the applicant for three (3) years immediately preceding the date of the application, including, if applicable, the business license and permit history while operating as a tow service;

(e) All criminal convictions or proceedings in which a plea of guilty or nolo contendere was entered, including vehicle code violations;

(f) Such other identification and information as the chief of police deems necessary to carry out the purposes of this article.

(Ord. No. NS-1616, § 1, 1-4-82)

Sec. 32-84. Denial of permit.

The chief of police, or his authorized representative, within thirty (30) days from the date a completed application is filed or longer upon a showing of good cause, shall cause an investigation of the applicant, and the application for a permit may be denied within such period of time on any of the following grounds:

(a) The applicant is unfit to be trusted with the privileges granted by such permit, or has a bad moral character, intemperate habits or a bad reputation for truth, honesty or integrity;

(b) The applicant is a person under the age of eighteen (18) years;

(c) The applicant, his agent or employee, or any person connected or associated with the applicant as partner, director, officer, stockholder, associate or manager has committed or aided or abetted in the commission of any act or act of omission which if committed by a permittee would be grounds for suspension or revocation of a permit; or

(d) The applicant, his agent or employee, or any person connected or associated with the applicant as partner, director, officer, stockholder, associate or manager has been refused a permit or had a permit revoked or has been an officer, director, member,

partner or manager of any person who has been refused a permit or had a permit revoked.

(Ord. No. NS-1616, § 1, 1-4-82; Ord. No. NS-2159, § 3, 6-15-92)

Sec. 32-85. Notice of denial of permit.

The chief of police, or his authorized representative, within the period of time specified in section 32-84, shall notify the applicant of his intention to deny an application for a permit. Service of such notice shall be made personally or by United States mail. The notice shall include the reasons for denial and be accompanied by a statement that the applicant may appeal such denial in accordance with the provisions of Chapter 3 of this Code.

(Ord. No. NS-1616, § 1, 1-4-82; Ord. No. NS-2159, § 4, 6-15-92)

Sec. 32-86. Permit suspension or revocation – Generally.

The chief of police may, in his discretion or upon the verified complaint in writing of any person, investigate the actions of any permittee and may temporarily suspend for a period not exceeding one year or revoke the permit of any permittee who commits any one or more of the acts or omissions constituting grounds for suspension or revocation as provided by this article. Written notice by United States mail shall be furnished the permittee who, within ten (10) days after receipt of notice of suspension or revocation, may request a hearing before the chief of police, or his designee.

(Ord. No. NS-1616, § 1, 1-4-82)

Sec. 32-87. Same – Grounds for.

It shall be grounds for suspension or revocation of a permit if any permittee, his agent or employee or any person connected or associated with the permittee as partner, director, officer, stockholder, general manager, or person who is exercising managerial authority of or on behalf of the permittee has:

(a) Knowingly made any false, misleading or fraudulent statement of a material fact in an application for a permit, or in any report or record required to be filed with the police department; or

(b) Violated any provision of this article or of any statute relating to his permitted activity; or

(c) Failed to obtain a current, valid license to do business in the city; or

(d) Been convicted of a felony or any crime involving theft or embezzlement; or

(e) Committed any act constituting dishonesty or fraud; or

(f) Committed any unlawful, false, fraudulent, deceptive or dangerous act while conducting a towing operation business; or

(g) Published, uttered or disseminated any false, deceptive or misleading statements or advertisements in connection with the operation of the towing service; or

(h) Violated any rule or regulation adopted by the city council relating to permittee's business; or

(i) Wilfully failed to comply with the terms of any contract made as a part of the exercise of the towing operation; or

(j) Conducted the towing operation in a manner contrary to the peace, health, safety and general welfare of the public; or

(k) Demonstrated that he is unfit to be trusted with the privileges granted by such permit.

(Ord. No. NS-1616, § 1, 1-4-82)

Sec. 32-88. Same – Additional grounds.

The following acts committed by a permittee hereunder shall be additional grounds for the suspension or revocation of a permit:

(a) The permittee, his agents or employees, obtained a tow contract by use of fraud, trick, dishonesty or forgery; or

(b) The permittee, his agents or employees, stopped and solicited on any street, highway or other public thoroughfare the rendering of assistance to a person or disabled vehicle without first being requested to do so except to render emergency aid when there exists an imminent peril to life or property; or

(c) The permittee, his agents or employees, towed a vehicle to a location other than listed as the business address of such permittee without first receiving authorization to do so by the person authorizing the tow; or

(d) The permittee, his agents or employees, after towing a vehicle to the business location of permittee, without authorization, towed such vehicle to another location for storage; or

(e) The permittee, his agents or employees, have conspired with any person to defraud any owner of any vehicle, or any insurance company, or any other person financially interested in the cost of the towing or storage of any vehicle, by making false or deceptive statements relating to the towing or storage of any vehicle; or

(f) The permittee, his agents or employees, removed a vehicle involved in a collision prior to arrival of police, and a person, as a result of such collision suffered death or injury; or the driver of an involved vehicle, or a party to such collision, was under the influence of an intoxicant of any nature; or there is evidence that such vehicle was involved in a hit-and-run collision; or

(g) The permittee, his agents or employees, have charged for services not performed, equipment not employed or used, services or equipment not needed, or have otherwise materially misstated the nature of any service performed or equipment used.

(Ord. No. NS-1616, § 1, 1-4-82)

Sec. 32-89. Same – Hearing.

Upon receipt of a request for hearing by permittee, as provided in this article, the chief of police, or his designee, shall notify permittee by United States mail of the time and place of such hearing. Such hearing shall be

held within thirty (30) days after the chief of police's receipt of a request for hearing, unless the permittee waives this time period, in which case the hearing may be held on a later date. Any hearing, once commenced, may be continued by the chief of police or at the request of the permittee.

At the conclusion of such hearing, the chief of police, or his designee, may render a decision which shall become effective immediately, or in the alternative, the chief of police, or his designee, may elect to render a written decision which shall be furnished the permittee by United States mail not less than two (2) working days following the conclusion of the hearing. Such written decision shall become effective two (2) working days after the date of mailing of the notice.

The decision of the chief of police, or his designee, may be appealed in accordance with the provisions of Chapter 3 of this Code, and the permittee shall have the burden of proving that the decision rendered by the chief of police, or his designee, was unreasonable, erroneous or a clear abuse of discretion.

(Ord. No. NS-1616, § 1, 1-4-82; Ord. No. NS-2159, § 5, 6-15-92)

Sec. 32-90. New application after denial or revocation of permit.

When the permit of any person is revoked for cause, no new or other application for a permit from the same person shall be accepted within one year after such revocation. When an application for a permit is denied for cause, no new or other application for a permit from

the same person shall be accepted within one year after denial unless the applicant can show a material change in his situation which would justify the issuance of such permit.

(Ord. No. NS-1616, § 1, 1-4-82)

Sec. 32-91. Insurance required.

Before an application for a permit to operate a towing operation will be received or acted upon, the applicant must furnish the chief of police, or his designee, satisfactory evidence of insurance as required by state law.

(Ord. No. NS-1616, § 1, 1-4-82; Ord. No. NS-2159, § 6, 6-15-92)

Sec. 32-92. Business location.

Any person conducting a towing operation business shall maintain a physical location from which said business is conducted. Such physical location shall provide an office with an adjacent yard for vehicle storage. Such location, whether situated within or outside the city, shall be approved by the chief of police, or his designee, prior to the permit being issued. If the permittee wishes to establish and maintain an additional location within the city as a yard for vehicle storage, such additional location shall be approved by the chief of police, or his designee, and shall show conformity with chapter 41 of this Code.

(Ord. No. NS-1616, § 1, 1-4-82; Ord. No. NS-2159, § 7, 6-15-92)

Sec. 32-93. Towing authorization.

A permittee shall not attach a vehicle to a tow unit without first receiving written authorization to do so by

the registered owner, legal owner, driver, or other person in control of said vehicle. Such authorization shall list the services offered and the rates and charges required therefor. A copy of such authorization shall be furnished to the person authorizing the tow. Such copy shall list the name, address and telephone number of the towing operation business and the days and hours the business is open for release of vehicles. Such copy shall also be signed by the tow unit operator performing the authorized service.

(Ord. No. NS-1616, § 1, 1-4-82)

Sec. 32-94. Removal of vehicle from private property; notification, fee.

(a) It is the responsibility of the permittee and his tow truck operator to ensure that the Santa Ana Police Department is notified by the owner or person in lawful possession of the private property pursuant to California Vehicle Code, Section 22658 prior to the tow truck operator removing any illegally parked vehicle. The tow truck operator, when authorized by the owner or person in possession of the private property, shall notify the Santa Ana Police Department on behalf of the owner or person in possession of the private property.

(b) The city council may, by resolution, establish a fee to defray the cost of logging and creating computer entries for vehicles stored from private property. The fee shall be paid by the towing operation permittee under this article, and may be added as a proper charge to the person causing the vehicle removal from private property or to the person owning such vehicle.

(Ord. No. NS-1616, § 1, 1-4-82; Ord. No. 2164, § 1, 7-6-92)

Sec. 32-95. Itemized statement; when required.

A permittee hereunder shall furnish an itemized statement to the person authorizing the towing service, or his agent. Such permittee shall furnish an itemized statement of services performed, labor and special equipment used in completing tow of the vehicle and of the charges made therefor upon the request of:

(a) The registered owner; or

(b) The legal owner; or

(c) The insurance carrier of either (a) or (b); or

(d) The duly authorized agent of any of the foregoing.

Such permittee shall furnish a copy of the statement to any person authorized to receive the statement without demanding payment as a condition precedent.

(Ord. No. NS-1616, § 1, 1-4-82)

Sec. 32-96. Vehicle repair or alteration; when permitted.

No permittee shall make any repairs or alterations to a vehicle without first being authorized by:

(a) The registered owner; or

(b) The legal owner; or

(c) The insurance agent of either (a) or (b); or

(d) The authorized agent of any of the foregoing.

Parts or accessories shall not be removed from the vehicle without authorization except as necessary for security purposes. Under such circumstances, the parts or accessories removed shall be listed on the itemized statement and stored in the business office. This section shall not be construed as prohibiting the permittees from making emergency alterations necessary to permit the removal by towing of such vehicle.

(Ord. No. NS-1616, § 1, 1-4-82)

Sec. 32-97. Release of vehicle.

Permittees shall provide for release of vehicles Monday through Friday from 8:00 a.m. to 5:00 p.m. excluding officially recognized holidays. Permittees may additionally release vehicles on other days and hours.

Upon application to the chief of police, or his designee, and a showing of hardship by the permittee, an adjustment in the days and hours during which vehicles may be released may be made.

(Ord. No. NS-1616, § 1, 1-4-82; Ord. No. NS-2159, § 8, 6-15-92)

Sec. 32-98. Rates and charges; signs, change of.

(a) Permittees shall maintain a sign listing the rates and charges of all services offered. Such sign shall be conspicuously placed in the office or other place where customer financial transactions take place. The letters on such sign shall be a minimum of one inch high with one-quarter inch stroke. The letters shall be a contrasting color from the background.

(b) Applicants for towing operation permits shall file a schedule of rates and charges for each service offered with the police department. No charge other than the rates and charges specified in such schedule shall be made except as herein provided.

Changes in rates and charges shall be made by written notice containing the new schedule of rates and charges to the police department at least ten (10) days prior to becoming effective. A duplicate copy of such notice shall be posted for a period of ten (10) days in the office of the towing operation business next to the posted schedule of existing rates and charges.

(Ord. No. NS-1616, § 1, 1-4-82)

Sec. 32-99. Tow truck operators – Permit required; renewal of same; revocation or suspension of same.

(a) No person shall operate or drive a tow truck, as defined in subsection (a) of Section 615 of the California Vehicle Code, or a tow dolly, as defined in Section 617 of the California Vehicle Code, without a written operator's permit from the chief of police. Operators' permits issued pursuant to the provisions of this article, unless sooner revoked, suspended or canceled, shall be effective for a period of three (3) years from the date of issuance and may be renewed for successive three-year periods of time. Applications for renewal shall be treated as applications for an operator's permit, subject to all applicable provisions of this article. Applications for renewal, and the appropriate fee, shall be filed with the chief of police not later than thirty (30) days before the expiration of the operator's permit.

(b) No person shall be employed by a permittee as a tow truck operator until such time as said person has received a written permit from the chief of police to act as a tow truck operator. It shall be the responsibility of the permittee to have all operators of tow trucks or tow dollies in its employ obtain an operator's permit from the chief of police.

(c) An application for an operator's permit shall be filed with the chief of police on forms furnished by him, shall be accompanied by a fee in an amount established by resolution of the city council, and shall contain the following information:

(1) The name, date of birth, driver's license number, business address and residence address of the applicant;

(2) The occupation and employment history of the applicant for three (3) years immediately preceding the date of the application;

(3) All criminal convictions or proceedings in which a plea of guilty or nolo contendere was entered, including vehicle code violations; and

(4) Such other identification and information as the chief of police deems necessary to carry out the purposes of this article.

(d) The chief of police, or his authorized representative, within thirty (30) days from the date a completed application is filed or longer upon a showing of good cause, shall cause an investigation of the

applicant, and the application for an operator's permit may be denied within such period of time on any of the following grounds:

(1) The applicant is a person under the age of eighteen (18) years;

(2) The applicant is a narcotics offender or uses dangerous drugs or alcohol to an excessive degree;

(3) The applicant has been convicted of a moving violation or violations showing a disregard for public safety (four (4) or more moving citations or a "driving under the influence" citation within the last three (3) years);

(4) The applicant has willfully furnished false information on his or her application or omitted information requested on said application;

(5) The applicant has been convicted of a felony or any crime involving moral turpitude within five (5) years preceding the date of application;

(6) The applicant has been convicted of a crime or crimes involving the theft of vehicles or parts therefrom; or

(7) The applicant does not hold a valid driver's license issued by the department of motor vehicles of this state or any license which is required by this state.

(e) The chief of police, or his authorized representative, shall notify the applicant of his intention to deny an application for an operator's permit. Service of such notice shall be made personally or by United

States mail. The notice shall include the reasons for denial and be accompanied by a statement that the applicant may appeal such denial in accordance with the provisions of chapter 3 of this Code.

(f) The chief of police may, in his discretion or upon the verified complaint in writing of any person, investigate the actions of any holder of an operator's permit and may temporarily suspend for a period not exceeding one (1) year or revoke the permit of any operator who commits any one (1) or more of the acts or omissions constituting grounds for denial of an operator's permit as provided by this article. Written notice by United States mail shall be furnished to the permittee who, within ten (10) days after receipt of notice of suspension or revocation, may request a hearing before the chief of police or his designee.

(g) Hearings regarding the suspension or revocation of an operator's permit, and any appeal from a decision of the chief of police, shall be governed by the provisions of section 32-89 of this article.

(h) When an operator's permit of any person is revoked for cause, no new or other application for an operator's permit from the same person shall be accepted within six (6) months after such revocation. When an application for an operator's permit is denied for cause, no new or other application for a permit from the same person shall be accepted within six (6) months after denial unless the applicant can show a material change in his or her situation which would justify the issuance of such permit.

(Ord. No. NS-1616, § 1, 1-4-82; Ord. No. NS-2159, § 9, 6-15-92)

Sec. 32-100. Same – Identification card.

Every person directly engaged in the operation of a tow truck shall carry on his or her person at all times while so engaged an identification card, issued by the police department, identifying the bearer as a tow truck operator, and shall display such card to any police officer upon request. The identification card shall bear the name, physical description, business address and photograph of the operator, and the name and address of the garage employing the operator.

The identification card shall be returned to the police department immediately upon suspension, revocation or termination of employment.

(Ord. No. NS-1616, § 1, 1-4-82; Ord. No. NS-2159, § 10, 6-15-92)

Sec. 32-101. Permits nontransferable.

Towing operation permits shall not be transferable except as hereinafter provided.

(Ord. No. NS-1616, § 1, 1-4-82 Ord. No. NS-2159, § 11, 6-15-92)

Sec. 32-102. Change of ownership – Transferees, successors entitled to transfer.

When a towing operation for which a permit has been issued is sold or transferred to one of the transferees listed in this section, the chief of police, or his designate, may endorse a change of ownership on such permit upon

written application by the transferee. Only the following transferees or successors shall be entitled to such transfer of permit.

(a) Duly qualified representatives of permittees regularly appointed by courts of competent jurisdiction, assignees for the benefit of creditors, and spouses or children of deceased permittees;

(b) The surviving partner or partners of a dissolved partnership;

(c) A new partnership consisting of the members of a predecessor partnership, plus their spouse or spouses of any such members;

(d) A new corporation organized and controlled by an individual or unincorporated permittee for the purpose of acquiring, and which has acquired the assets of the business previously owned and operated by such permittee;

(e) Upon dissolution of a closely held corporation, the stockholders to whom the assets are distributed.

(Ord. No. NS-1616, § 1, 1-4-82)

Sec. 32-103. Same – Application fee.

A transferee or successor entitled to a transfer of permit must file an application for such transfer with the chief of police within thirty (30) days after he assumes control of the towing operation. The chief of police may require such evidence of the transfer of ownership or control as he deems necessary. A fee equal to twenty (20) per cent of the original fee for the permit shall accompany the application.

(Ord. No. NS-1616, § 1, 1-4-82)

Sec. 32-104. Same – Action on.

The chief of police shall transfer the permit to an applicant entitled to such transfer if he finds that the transfer will not adversely affect the peace, health, safety, convenience and general welfare of the public, and the transferee possesses the qualifications required of original applicants.

(Ord. No. NS-1616, § 1, 1-4-82)

Sec. 32-105. Permit for each location required.

No permittee shall conduct a towing operation at a location other than the location specified in the permit.

(Ord. No. NS-1616, § 1, 1-4-82)

Sec. 32-106. Change of location.

Where no conflict exists with the city's zoning regulations or other provisions of this Code, a change of location may be endorsed on a permit by the chief of police, or his designee, upon written application by a permittee, accompanied by a change of location fee as established by resolution of the city council.

(Ord. No. NS-1616, § 1, 1-4-82)

Sec. 32-107. Towing operation guidelines; rotational list; authority of the chief of police to promulgate written guidelines.

In order to provide a workable and comprehensive policy regarding the towing and/or storage of abandoned, disabled, stored or impounded vehicles from public or private property, the chief of police is hereby

authorized to promulgate and issue, by general order, and amend, if necessary, written rules and regulations governing the following but by no means exclusive subjects:

(a) Establishment of a rotational list of towing operations holding permits under this article;

(b) Requirements and standards for placement on the rotational tow list;

(c) Requirements and standards for continued placement on the rotational tow list;

(d) Grounds for, and procedures governing, removal from the rotational tow list; and

(e) Any other pertinent and relevant matters pertaining to the administration of a rotational tow list.

Such rules and regulations shall have the force and effect of law, and the failure to obey same shall be deemed a violation of the provisions of this article for purposes of renewal, suspension or revocation of a towing operation permit.

(Ord. No. NS-1616, § 1, 1-4-82; Ord. No. NS-2159, § 12, 6-15-92)

Supreme Court, U.S.
FILED
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No. 00-916

In The

Supreme Court of the United States

CITY OF SANTA ANA, CALIFORNIA,

Petitioner,

v.

PATRICK P. TOCHER, dba PACIFIC COAST MOTORING; and SANTA ANA POLICE TOWING ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CITY'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

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CITY'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

Petitioner City of Santa Ana hereby submits this supplemental brief to call this Honorable Court's attention to a published opinion just decided which supports the City's petition. Supreme Court Rules, Rule 15.8.

I. INTRODUCTION

On February 1, 2001, the California Court of Appeal issued its opinion in *People v. Servantes*, ___ Cal.App.4th ___, ___ Cal.Rptr.2d ___, 2001 WL 83563. A true and correct copy of this opinion is attached to this supplemental brief as Appendix 1, for the convenience of the Court.

The portion of the opinion certified to be published, and therefore binding precedent on all trial courts in the State of California once final[1] (*Auto Equity Sales v. Superior Court*, 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937 (1962)), refuses to follow the holdings of the Ninth Circuit for which the City seeks certiorari.

The *Servantes* court is entitled to reject the published decisions of the Ninth and Eleventh Circuits and follow instead the Second Circuit, because, under California law:

> In the absence of a controlling United States Supreme Court decision on a federal question,

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[1] *Servantes* will be final thirty (30) days after February 1, 2001, unless rehearing is granted. California Rules of Court Rule 24(a). Thereafter, the defendant has thirty (30) days to petition the California Supreme Court for discretionary review. California Rules of Court Rule 28(a)(1).

> we are free to make an independent determination of law. *(Tully v. World Savings & Loan Assn.* (1997) 56 Cal.App.4th 654, 663.)

Servantes, 2001 WL 83563 at *6, Appendix at App. 13.

If this Honorable Court does not accept the City's petition in this case, the 500 local governments in California and the thousands of California tow truck operators will be in a quandary. Bring suit in any California state court and 49 U.S.C. § 14501(c) does not preempt California Vehicle Code provisions requiring tow truck operators to accept credit cards and prohibiting them from picking up illegally parked cars from private property without permission of the property owner. *Servantes*, 2001 WL 83563 at *6, Appendix at App. 13. But bring suit in any California federal court and these provisions are deemed preempted. *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1050 (9th Cir. 2000).

Bring suit in any California state court and local ordinances requiring police permits and safety regulations are legal, on the grounds that Congress has excepted them from preemption. *Servantes*, 2001 WL 83563 at *9, Appendix at App. 19. But bring suit in any California federal court and such ordinances are preempted on the theory that Congress has barred delegation of the state's safety exception to local governments. *Tocher v. City of Santa Ana*, 219 F.3d at 1051.

It is one thing for this Honorable Court to decline to exercise its jurisdiction when the interpretation of a federal statute in Atlanta is different from that in New York City; tow truck operators from Georgia rarely do business in New York. It is quite another for this Court to decline

to grant certiorari when federal and state courts in the most populous state in the union have reached totally disparate results in interpreting the same federal statute. It is respectfully submitted that this Court must grant Santa Ana's petition to avoid the chaos that would otherwise be caused by the *Servantes* and *Tocher* decisions.[2]

II. *SERVANTES* SUPPORTS SANTA ANA'S PETITION FOR CERTIORARI

The court's opinion in *Servantes* offers broad support for Santa Ana's petition. First, the opinion underlines the reason that regulation of tow truck operators is an area which traditionally is the primary responsibility and right of the states and municipalities.[3] Twenty-four (24) witnesses testified during a six (6) day trial of the shady operation conducted by Bayshore Towing, Mr. Servantes' company.[4] *Servantes*, 2001 WL 83563 at *2-*3, Appendix at App. 5-App. 8. Bayshore's operation routinely towed cars without authorization or knowledge of the private property owner, leaving vehicle owners to believe that their cars were stolen. Bayshore's refusal in 747 documented cases, to accept credit card payments, led to "vivid testimony"

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[2] And this does not even take into account the effect of the well-reasoned *Servantes* opinion on other federal district courts and circuit courts of appeal, as they decide whether to follow the Ninth and Eleventh Circuits or the Second Circuit.

[3] *See* Validity and Construction of Statute or Ordinance Regulating Vehicle Towing Business, 97 A.L.R. 495.

[4] The evidence elicited at Servantes' trial was virtually identical to the two "Scenarios" set forth at pages 6-7 of the City's petition.

of vehicle owners left alone at night in "desolate locations" in fear for their safety. *Servantes*, 2001 WL 83563 at *7, Appendix at App. 14-App. 16.

The *Servantes* court notes that the Ninth Circuit's opinion in *Tocher*, holding provisions of the California Vehicle Code preempted as being adopted for "consumer protection" and not "safety," was reached "without analysis or discussion." *Servantes*, 2001 WL 83563 at *6, Appendix at App. 14. As the *Servantes* court's opinion continues, the Ninth Circuit panel ignored directly applicable state case law on this issue of state law:

> Moreover, [the Ninth Circuit panel] reached its conclusion without mention, let alone discussion, of *Berry v. Hannigan* (1992) 7 Cal.App.4th 587, 591, which specifically stated that subdivision (k) of Vehicle Code section 22658 " 'directly affects the safety and welfare of vehicle owners and operators.' " In *Berry* Division One of this court addressed the issue of the constitutionality of the law requiring tow operators to accept credit cards and, on the way to finding it constitutional, noted as follows: " 'It cannot be doubted that the unexpected loss of the use of one's vehicle directly affects the safety and welfare of vehicle operators and owners. A person may be stranded hundreds of miles from home with no alternative mode of return travel and with no place to stay until the vehicle can be recovered. . . . Legislation which tends to assist members of the public from involuntarily losing the use of their vehicles and which tends to expedite recovery of their vehicles once they have been removed fairly and clearly promotes the safety and welfare of the public.' " (*Berry v. Hannigan, supra*, at p. 591, quoting *Crane Towing,*

Inc. v. Gorton (1977) 89 Wn.2d 161 [570 P.2d 428, 434].)

Ibid.

Further, the *Servantes* court rejected the holding of the Ninth and Eleventh Circuits, and instead followed the Second Circuit, on the issue of whether the states may delegate their safety and insurance exception (49 U.S.C. § 14501(c)(2)(A)) to local governments. The court held:

> We find the Second Circuit's opinion in *Ace* more persuasive and follow its reasoning here. When, as here, a federal statute expressly preempts state or local law, the determination of the scope of the preemption must " 'start with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress.' [Citations.]" *(Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485; see also *Southern Cal. Gas Co. v. Occupational Safety & Health Appeals Bd., supra,* 58 Cal.App.4th at p. 204.) Because safety regulations fall within the traditional police powers of the states, and because Congress has expressly excepted safety regulations from the preemption clause, we cannot curtail the ability of local municipalities to respond to local safety concerns without a clear expression that such was the intent of Congress. *(Southern Cal. Gas Co. v. Occupational Safety & Health Appeals Bd., supra,* at p. 205.)
>
> At best, the legislative history shows that Congress's deregulatory purpose was focused on disparate *economic* regulation: "[P]reemption legislation is in the public interest as well as necessary to facilitate interstate commerce. *State economic regulation* of motor carrier operations

> causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets. . . . The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." (H.R. Conf. Rep. No. 103-677, 2d. Sess. (1994), reprinted in 1994 U.S. Code Cong. & Admin. News, pp. 1715, 1758-1759, italics added.) In fact, the House Conference Report indicated that "State authority to regulate safety, financial fitness and insurance . . . of motor carriers is unchanged, since State regulation in those areas is not a price, route or service and thus is unaffected." (*Id.* at p. 1757.)
>
> * * *
>
> Had Congress intended not to except municipal safety regulations, Congress could have said so. We can discern no violation of principles of federalism in a construction of section 14501(c)(2)(A) that allows a state to delegate its authority to a municipality. (See *Wisconsin Public Intervenor v. Mortier* (1991) 501 U.S. 597, 607-609, 611-612 [act permitting "States" to regulate pesticides authorized states to allow local regulation of pesticides].)

Servantes, 2001 WL 83563 at *9, Appendix at App. 18-App. 20 (emphasis in original).

The *Servantes* court's holding is also consistent with this Honorable Court's reasoning in its January 9, 2001 opinion in *Solid Waste Agency Of Northern Cook County v. United States Army Corps Of Engineers*, ___ U.S. ___, 121

S.Ct. 675, 683-84.[5] This Court stated that federal laws adopted under the Commerce Clause, should be interpreted, when possible, to avoid the significant constitutional and federalism questions raised by rulings such as that by the Ninth Circuit in *Tocher*.

Regulation of tow truck businesses is no less an area of traditional state and local police power as is the land use power at issue in the *Cook County* decision. *See* footnote 3, *supra*. The Ninth and Eleventh Circuits have interpreted 49 U.S.C. § 14501(c) without keeping this critical rule, required by our system of federalism, in mind.

III. CONCLUSION

The *Servantes* court's opinion is well-reasoned and deserves the respect of this Honorable Court. But even were this Court to disagree with the rationale of *Servantes*, the ongoing chaos caused by the dispute over the extent of the preemption of 49 U.S.C. § 14501(c) surely requires this Court's intervention. It is respectfully

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[5] This opinion also postdates the City's most recent brief, and is appropriate for discussion pursuant to Supreme Court Rule 15.8.

submitted that the City of Santa Ana's petition for issuance of a writ of certiorari should be granted.

Respectfully submitted,

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February 7, 2001

CERTIFIED FOR PARTIAL PUBLICATION[1]

IN THE COURT OF APPEALS OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE ex rel. LOUISE H. RENNE, as City Attorney, etc.,	**A089493**
Plaintiff and Respondent,	**(San Francisco County Super. Ct. No. 997979)**
v.	
PATRICK SERVANTES,	
Defendant and Appellant.	

Presiding Justice Harold G. Clarke of the Georgia Supreme Court observed that "[t]he law gives the towing company a great advantage over the owner of the towed car, and creates a great potential for unfair business practices and abuse of the public." (*Porter v. City of Atlanta* (1989) 384 S.E.2d 631, 634.) While that observation was made 11 years ago and some 3,000 miles away, Justice Clarke was talking about Patrick Servantes (Servantes), who over a period of years committed myriad unfair business practices and abused the public, towing hundreds of cars off private property in abject disregard of applicable California law and San Francisco regulations. Such practices included towing vehicles without a permit, towing vehicles from private property without

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[1] Pursuant to California Rules of Court, rules 976(b) and 976.1, parts IV, V and VI of this opinion are not certified for publication.

authorization from the property owners, refusing to accept credit cards as payment for towing and storage charges to allow release of the vehicle, and imposing excessive towing and storage charges.

The City Attorney of San Francisco brought suit to curtail Servantes's practices, alleging a claim for unfair business practices (Bus. & Prof. Code, § 17200 et seq.) and seeking a permanent injunction, civil penalties, and disgorgment of profits. Prior to trial the city attorney obtained a preliminary injunction ordering Servantes to refrain from such conduct.

Following a six-day trial at which the city attorney presented 24 witnesses, the trial court found that Servantes had committed hundreds of violations of state and local laws and ordered him to pay a civil penalty of $74,700, representing $100 for each of the 747 illegal tows, and further ordered him to disgorge his illegal profits of $52,500 as restitution to the victims. The court also found that Servantes had violated the preliminary injunction 174 times, for which the court assessed an additional penalty of $87,000, calculated at $500 for each violation. Finally, the court permanently enjoined Servantes from towing vehicles from private property within the State of California and imposed restrictions on consensual towing by Servantes.

Servantes appeals, asserting three arguments, one with two subparts: (1) federal law preempts the laws on which the trial court relied; (2) the judgment and fines (a) violate due process and (b) are not supported by substantial evidence; and (3) the injunction is void. We conclude

that none of Servantes's claims has merit, and we affirm the judgment.

I. The Regulatory Scheme

We begin our analysis with the pertinent regulatory scheme, starting with Vehicle Code section 22658, by which the California Legislature has undertaken to regulate the removal of vehicles from private property by a towing service.[2] That section provides, among other things, that the property owner must first notify the police (subd. (a)) and that the towing company must have written authorization from the property owner or agent, who must be present at the time of the tow (subd. (l)). Section 22658 also provides that the towing company may not impose excessive charges for towing and storage (subd. (i)), and requires that the owner of the storage facility to which the vehicle is towed accept a bank credit card or cash for the towing and storage charges (subd. (k)).[3]

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[2] The Legislature has also enacted a statutory scheme regulating the removal of vehicles from streets and highways by police officers. (Veh. Code, § 22650 et seq.) The issues before us in this appeal, however, are confined to towing from private property.

[3] Vehicle Code section 22658 provides a private right of action for the owner of the towed vehicle. A private property owner who causes the removal of a vehicle without complying with statutory requirements is liable to the vehicle owner for double the towing and storage charges (subd. (e)). A towing service which removes a vehicle without written authorization is liable to the vehicle owner for four times the towing and storage charges (subd. (l)(3)). Similarly, anyone who charges excess towing or storage fees is liable to the vehicle owner for

The Legislature has also delegated to local authorities the power to regulate the licensing and operation of towing services and tow truck drivers. (Veh. Code, § 21100, subd. (g).)[4] Pursuant to that authority, the City and County of San Francisco (City) has enacted ordinances which require towing companies and tow truck drivers to obtain a permit before removing vehicles from private property. (S.F. Police Code, § 3000.) The permit scheme requires an application to the Chief of Police, payment of an application fee, and an investigation and hearing. (S.F. Police Code, §§ 3002-3004.) The ordinance requires the towing companies to notify the police tow desk within 30 minutes of every vehicle removed from private property, providing the tow truck driver's name and permit number and identification of the vehicle. (S.F. Police Code, § 3057.) The ordinance further requires the towing companies to maintain records of each towed vehicle and to retain those records for three years. (S.F. Police Code, § 3060.) Another City ordinance requires towing companies removing vehicles from private property to prominently display a copy of their schedule of

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four times the amount charged (subd. (j)). And any operator of a storage facility who fails to accept a credit card is liable to the vehicle owner for four times the towing and storage charges not to exceed $500 (subd. (k)).

[4] Likewise, the Legislature has delegated to local authorities the power to establish procedures and set costs for the release of vehicles removed by police officers. (Veh. Code, § 22850.5.)

fees, prohibits charging excess fees, and requires acceptance of credit cards, cash, or checks for release of towed vehicles.[5] (S.F. Traffic Code, §§ 172.03, 172.05, 172.08.)

II. Servantes's Conduct

Servantes first became involved in towing in 1991 or 1992 and opened his own company, Bayshore Towing (Bayshore), in 1993. On September 14, 1993, Servantes was issued a tow operator permit from the City. Within months, specifically in June 1994, that permit was revoked based on findings that Servantes had illegally removed vehicles from public streets and then reported them as private property tows, illegally demanded payment in cash, and charged excessive amounts to release the vehicles.

In April 1995 Servantes applied for a new permit as a tow operator and owner of Bayshore, but his application was denied based on his prior misconduct. However, Bayshore was subsequently issued a permit when Servantes reported that a new general manager, Allen Lawson, had taken over the company. Later, in 1996, Lawson notified the police permit division that he was no longer associated with Bayshore, and he surrendered his towing permit.

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[5] Fees for towing of vehicles from public streets are set by agreement between the City and a contracting towing company. (See S.F. Traffic Code, § 172.04.) Fees for removing vehicles from private property may not exceed those contractual rates. (Veh. Code, § 22658, subd. (i); S.F. Traffic Code, § 172.04.)

After that development, Servantes and other Bayshore drivers were stopped several times by the police and cited for towing vehicles without a permit and for driving without a valid driver's license. Servantes applied for a new permit, and in July 1998 the application was denied on the ground that Servantes had continued to operate his towing business despite his lack of a permit by using false identification. The hearing officer further found that Servantes had refused to accept credit card payments, overcharged for towing and storage, and towed vehicles onto public streets before towing them to his storage facility.

In the meantime, police investigations were undertaken of Servantes and his towing operations based on numerous citizen complaints, which investigation eventually led to the police determination that Servantes was conducting an unlicensed towing operation.[6] As part of the investigation, the police conducted a stakeout operation by placing a car in a private parking lot from which Bayshore had been towing vehicles. Within 15 minutes, when no attendant was at the lot, Servantes picked up the car and towed it to his storage lot.

At trial, the logs from the City's police tow desk dated from January 1, 1996, to June 30, 1999, were introduced and showed that Servantes was continuing to tow vehicles from private property despite the revocation of his permit. During that time Bayshore had conducted 747

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[6] Pursuant to a search warrant, the police seized some miscellaneous papers found in a vehicle on Bayshore's storage lot. The police also seized three of Servantes's five tow trucks.

tows, 523 of which were reported as having been conducted by Ernesto DeAlba, Martin Sexton, or Allen Lawson, at times when these drivers were not working for Bayshore. As to this, the trial court found that Servantes himself had conducted the tows and had falsely given another driver's name.

During discovery Servantes was asked to produce his business records including the written authorizations for towed vehicles, but he produced almost nothing. The trial court found that the few authorizations that were produced were inadequate in that they were missing vital information, such as the date of the tow, the vehicle license number, or the identity of the Bayshore driver who did the tow. Three police investigators testified at trial that in the course of their investigations they could find no evidence that written authorizations had been given for Bayshore's tows, illustrated, for example, by the fact that the space on the towing receipt form for the signature of the property owner was always left blank.

In addition, there was direct evidence of noncompliance with the law. One parking lot owner testified that he had contracted with Servantes to have Bayshore remove vehicles from his lot, but that many of the tows were unauthorized. Another parking lot owner reported to the police investigators that she left the towing decisions to Servantes. Three vehicle owners who had returned to the parking lots just as their cars were being hooked up to the Bayshore tow truck testified that no agent of the lot owner was present at the time. Two vehicle owners testified that they contacted the lot owner after their cars were towed, and the lot owner's agent was surprised the car had been towed.

The trial court further found that in all 747 cases Servantes had insisted on cash payment from the vehicle owners, refusing to accept credit cards or personal checks. Luis Jacques, a driver for Bayshore, gave testimony that Bayshore accepted only cash. None of the towing receipts produced by Servantes indicated payment by credit card. During the police investigation, questionnaires were sent to all owners of vehicles towed by Bayshore, and all who responded reported that Bayshore accepted only cash. Although Servantes testified he did accept credit cards, he also testified that he kept no receipts of credit card transactions. Servantes's credit card account statements showed virtually no activity from 1996 to 1999, and the little activity reflected was for an average charge in an amount less than the charge for a private property tow. Eleven victims testified at trial that they were told by Bayshore representatives that they had to pay in cash in order to retrieve their vehicles.

III. Federal Preemption

An unlawful business practice within the meaning of California's Unfair Competition Act (Bus. & Prof. Code, § 17200 et seq.) is one that is forbidden by law, whether civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 531-532; *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838-839.) A defense to the underlying offense is a defense under California's Unfair Competition Act. (*People v. Duz-Mor Diagnostic Laboratory, Inc.* (1998) 68 Cal.App.4th 654, 673.)

Here, Servantes did not dispute that he operated without a towing permit. His principal defense at trial was that the state and local regulations governing towing operations are preempted by federal law and were thus unenforceable. The trial court rejected the argument, and Servantes reiterates his argument on appeal. We review the issue de novo as an issue of law. (*Southern Cal. Gas Co. v. Occupational Safety & Health Appeals Bd.* (1997) 58 Cal.App.4th 200, 204.)

Congress enacted the Federal Aviation Administration Authorization Act of 1994 (FAAA Act), which expressly preempts state or local regulation "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." (49 U.S.C.[7] § 14501(c)(1).) This preemption of state and local regulation had two apparent purposes: first, to provide across-the-board deregulation and eliminate nonuniform state regulations of motor carriers that were interfering with interstate commerce; and second, to eliminate the advantage that had been enjoyed by air carriers, such as Federal Express, over the more heavily regulated ground-based shipping competitors. (*Californians for Safe Dump Truck Transp. v. Mendonca* (9th Cir. 1998) 152 F.3d 1184, 1187.)

There seems little question that a towing company qualifies as a "motor carrier," which is broadly defined as "a person providing motor vehicle transportation for compensation." (§ 13102(12).) Indeed, Congress's intent to include towing companies within the preemption

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[7] All further undesignated section references are to title 49 of the United States Code.

clause is revealed in section 14501(c)(2)(C), which provides a limited exception to allow state and local regulation of the price of nonconsensual towing services.[8] There would have been no need for Congress to include this exception if Congress had not intended to preempt state and local regulation of towing services generally. (*R. Mayer of Atlanta, Inc. v. City of Atlanta* (11th Cir. 1998) 158 F.3d 538, 543 (*Mayer*); see also *Ace Auto Body & Towing, Ltd. v. City of New York* (2nd Cir. 1999) 171 F.3d 765, 771 (*Ace*); *Hott v. City of San Jose* (N.D.Cal. 2000) 92 F.Supp.2d 996; *Harris Cty. Wrecker Owners v. City of Houston* (S.D.Tex. 1996) 943 F.Supp. 711, 720-724.)

Under the FAAA Act, a state or local regulation is preempted if it is "related to" the price, route, or service of a motor carrier. The United States Supreme Court has interpreted analogous language in the Airline Deregulation Act (§ 41713(b)) to mean that a state or local law is preempted if it has "a connection with, or reference to" airline rates, routes, or services, but not if the effect is " 'too tenuous, remote, or peripheral. . . . ' [Citation.]" (*Morales v. Trans World Airlines, Inc.* (1992) 504 U.S. 374, 384, 390; see *Ace Auto Body & Towing, Ltd. v. City of New York, supra*, 171 F.3d at p. 773; *Californians for Safe Dump Truck Transp. v. Mendonca, supra*, 152 F.3d at pp. 1188-1189.) Two federal appellate courts have considered

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[8] Section 14501(c)(2)(C), provides that the preemption clause of section 14501(c)(1) "does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle."

this language in the context of towing services and have reached parallel conclusions: the general rule of preemption does apply to the towing laws in issue.[9]

The first case is *R. Mayer of Atlanta, Inc. v. City of Atlanta, supra,* 158 F.3d 538, where the Eleventh Circuit Court of Appeals held that Atlanta's licensing scheme for towing companies was related to the service of a towing company and was thereby preempted "because the ordinances limit who is permitted to provide the services and require that individuals and companies satisfy various criteria before they provide the services." (*Id.* at p. 545; see also *Harris Cty. Wrecker Owners v. City of Houston, supra,* 943 F.Supp. at p. 725.) The second case is *Tocher v. City of Santa Ana* (9th Cir. 2000) 219 F.3d 1040 (*Tocher*), in which the Ninth Circuit recently concluded that Santa Ana's permit scheme had a direct effect on the towing market, as "the permit scheme erects barriers to entry and these barriers can affect competition for towing services in the City. [Citation.] The more applicants that are denied permits, the greater the effect on both the industry and its customers." (*Id.* at p. 1047.) Furthermore, the *Tocher* court held that the California Vehicle Code sections regulating the removal of vehicles from private property are related to a price, route, or service of a motor carrier in that the statutory provisions regulate how a company provides towing services. (*Tocher v. City of Santa Ana,*

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[9] In a third case, the Second Circuit Court of Appeals did not reach the question as the parties agreed that section 14501(c)(1) generally preempted the New York licensing laws for towing companies. (*Ace Auto Body & Towing, Ltd. v. City of New York, supra,* 171 F.3d at p. 771.)

supra, at p. 1047.) We are persuaded by those authorities that Vehicle Code section 22658 and the San Francisco ordinances related to towing operations are sufficiently connected to the service of a towing company that those laws fall within the general rule of preemption. But that does not end the inquiry.

The FAAA Act makes an explicit exception from the general rule of preemption for laws enacted pursuant to "the safety regulatory authority of a State with respect to motor vehicles. . . . " (§ 14501(c)(2)(A).)[10] In *Tocher*, the court concluded that some sections of the California Vehicle Code at issue there escaped preemption under this "safety regulation" exception: "[Vehicle Code section] 22650 prohibits a police officer (or other unauthorized person) from removing any unattended vehicle [from a highway] without strict compliance with the Vehicle Code. [Vehicle Code section] 22658.1 requires a towing company to notify a property owner if it was necessary to cut, remove, or damage a fence in order to remove a vehicle. Each of these provisions is designed to make the towing and removal of vehicles safer by insuring that only professionals tow vehicles and that the removal does not endanger the general public or the owner of the property where the vehicle was removed." (*Tocher v. City of Santa Ana, supra*, 219 F.3d at p. 1051.) However, as to

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[10] Section 14501(c)(2)(A), provides that the preemption clause of section 14501(c)(1) "shall not restrict the safety regulatory authority of a State with respect to motor vehicles, . . . or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization."

other sections of the Vehicle Code in issue in *Tocher*, which included Vehicle Code section 22658, subdivisions (k) and (l), pertaining to acceptance of credit cards and written authorization by the property owner, the court concluded, without discussion, that those provisions were "based on consumer protection rather than safety, and the safety exception is therefore inapplicable." (*Tocher v. City of Santa Ana, supra*, at pp. 1044, 1052.) We conclude otherwise.

Preliminarily we note, as we recently confirmed, that we are not bound by a federal circuit court opinion. (*Roskind v. Morgan Stanley Dean Witter & Co.* (2000) 80 Cal.App.4th 345, 355.) In the absence of a controlling United States Supreme Court decision on a federal question, we are free to make an independent determination of law. (*Tully v. World Savings & Loan Assn.* (1997) 56 Cal.App.4th 654, 663.) An opinion from the Ninth Circuit is no more significant than one from another circuit. (*Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 879; *Debtor Reorganizers, Inc. v. State Bd. of Equalization* (1976) 58 Cal.App.3d 691, 696.) In the present case, we decline to follow the *Tocher* court with respect to Vehicle Code section 22658.

As noted, Vehicle Code section 22658 requires the owner of private property to notify the police before causing a vehicle to be towed and requires the towing company to obtain the written authorization of the property owner (subds.(a) & (l)); it also requires that the storage facility accept a credit card for payment of the towing and storage charges (subd. (k)). In our view, this statute offers far more than economic protection to the consumer. By ensuring that removal occurs only upon

proper authorization, the statute obviously serves to protect vehicle owners and the public at large from both towing mistakes and outright theft of vehicles from private property. And by the requirement that the tow operator accept credit cards, the statute expedites recovery of the involuntarily towed vehicle. Thus, we disagree with *Tocher* that Vehicle Code section 22658 is merely a consumer protection statute, for several reasons.

As noted, *Tocher* reached its holding without analysis or discussion. Moreover, it reached its conclusion without mention, let alone discussion, of *Berry v. Hannigan* (1992) 7 Cal.App.4th 587, 591, which specifically stated that subdivision (k) of Vehicle Code section 22658 " 'directly affects the safety and welfare of vehicle owners and operators.' " In *Berry* Division One of this court addressed the issue of the constitutionality of the law requiring tow operators to accept credit cards and, on the way to finding it constitutional, noted as follows: " 'It cannot be doubted that the unexpected loss of the use of one's vehicle directly affects the safety and welfare of vehicle operators and owners. A person may be stranded hundreds of miles from home with no alternative mode of return travel and with no place to stay until the vehicle can be recovered. . . . Legislation which tends to assist members of the public from involuntarily losing the use of their vehicles and which tends to expedite recovery of their vehicles once they have been removed fairly and clearly promotes the safety and welfare of the public.' " (*Berry v. Hannigan, supra,* at p. 591, quoting *Crane Towing, Inc. v. Gorton* (1977) 89 Wn.2d 161 [570 P.2d 428, 434].)

Finally, the conclusion in *Tocher* ignores the realities of the situation, realities well demonstrated here. To

begin with, it is commonly understood that storage facilities for towed cars are unlikely to be located in densely populated, highly lighted locations, but rather in areas that might be described as desolate, especially at night when so much of the retrieval of towed cars takes place. Indeed, that was the evidence at bar: Bayshore was located in an industrial warehouse area of San Francisco.

The effect of this was demonstrated in vivid detail by the testimony of William Griffith, who described his plight – and his concern for his safety – that ensued upon his return to a private parking lot one Saturday evening to find his car missing and no one in the parking lot. Griffith called the number on the sign, but was told that there was no record of his car being towed. After believing for a while that his car had been stolen, Griffith called again and was told that his car had been towed and to call Bayshore. He did and was advised to go to the Bayshore storage lot. He did that, traveling by taxi cab, after spending 45 minutes trying to hail one. Griffith took the taxi to the "tow yard" and, concerned about its location, asked the taxi driver to wait with him while he retrieved his car. Griffith went to the gate, and the person there said he could not let him in and that he had to wait. After some 20 minutes, Griffith "ran out of money" to continue to pay the taxi driver, so he asked the driver take him to a McDonald's, where he used a pay telephone to again call Bayshore. Griffith asked "where they were," and the person responded they were "on their way." Griffith had the taxi driver return him to the tow yard, where he was let off to wait alone, as he had no more money to pay the driver. Griffith waited for another 45 minutes to an hour until Servantes finally arrived.

Griffith got out his credit card, to be expressly told that his credit card "won't be accepted and [that] only $140 cash would be accepted." Servantes then drove Griffith to an ATM machine where, as he put it, he was "just fortunate that [he] had enough money in the bank to cover it." Griffith withdrew the money, and they returned to the tow yard where he recovered his car.

In sum and in short, we find a public safety purpose in the protections Vehicle Code section 22658 offers to the owner of a vehicle.

That brings us to a discussion of the San Francisco regulations and whether the safety regulation exception applies to them. With respect to municipal ordinances, as distinct from state statutes, the existing case law is divided. On the one hand, the Eleventh Circuit held that the safety regulation exception did not apply to Atlanta's municipal ordinances because the exception authorizes only a "State" to enact safety regulations, not a municipality or other political subdivision of a state. (*R. Mayer of Atlanta, Inc. v. City of Atlanta, supra,* 158 F.3d at pp. 545-548.) The court pointed out that section 14501(c)(2)(A) is the only subsection of the FAAA Act that mentions the authority of a state without also mentioning the state's political subdivisions. Further, the court reasoned that the preemption of municipal ordinances is consistent with Congress's deregulatory purpose: "By withholding the authority to enact safety and insurance regulations from political subdivisions, Congress ensured that counties and municipalities would not enact differing (and perhaps inconsistent) sets of safety and insurance ordinances. Stated differently, it is reasonable to assume that Congress decided that safety and insurance

ordinances must be enacted on a statewide level, in order to minimize the disturbances to the motor transportation industry that a patchwork of local ordinances inevitably would create." (*R. Mayer of Atlanta, Inc. v. City of Atlanta, supra,* at pp. 545-546.)

A contrary result was reached by the Second Circuit in *Ace Auto Body & Towing, Ltd. v. City of New York, supra,* 171 F.3d at pp. 775-776, which declined to follow *Mayer.* The *Ace* court first concluded that the omission within the safety regulation exception of any mention of political subdivisions did not prevent a state from delegating its regulatory authority to a municipality. Further, the court reasoned that Congress's intent was to eliminate local economic regulation, not local safety regulation. Consequently, the *Ace* court held that New York City's requirements regarding licensing, recordkeeping, and other operations of towing businesses were directly related to safety concerns, with only an incidental economic burden, and thereby fell within the exception of section 14501(c)(2)(A). (See also *Hott v. City of San Jose, supra,* 92 F.Supp.2d 996; *Harris Cty. Wrecker Owners v. City of Houston, supra,* 943 F.Supp. at pp. 725-732.)

Most recently, the Ninth Circuit followed *Mayer* and held that the Santa Ana ordinances governing the operations of towing businesses were preempted and did not fall within the safety regulation exception, because that exception "only exempts safety regulations promulgated by state governments, not those enacted by municipalities." (*Tocher v. City of Santa Ana, supra,* 219 F.3d at p. 1050.) Interpreting the language of the FAAA Act in light of its purpose, the court held that Congress deliberately omitted *municipal* safety regulations from the exception.

"Allowing both states and municipalities to escape preemption under the guise of regulating safety could lead to widespread, diverse regulation of motor carriers, precisely what Congress sought to avoid in promulgating a broad preemption statute." (*Id.* at p. 1051.) Further, the court held that for preemption purposes a state may not delegate its regulatory authority to a municipality; otherwise, "Congress would always be required to preempt both state and local laws, or preempt neither. That result would violate fundamental principles of federalism and lead to a distorted interpretation of the Supremacy Clause." (*Ibid.*)

We find the Second Circuit's opinion in *Ace* more persuasive and follow its reasoning here. When, as here, a federal statute expressly preempts state or local law, the determination of the scope of the preemption must " 'start with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress.' [Citations.]" (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485; see also *Southern Cal. Gas Co. v. Occupational Safety & Health Appeals Bd., supra,* 58 Cal.App.4th at p. 204.) Because safety regulations fall within the traditional police powers of the states, and because Congress has expressly excepted safety regulations from the preemption clause, we cannot curtail the ability of local municipalities to respond to local safety concerns without a clear expression that such was the intent of Congress. (*Southern Cal. Gas Co. v. Occupational Safety & Health Appeals Bd., supra,* at p. 205.)

At best, the legislative history shows that Congress's deregulatory purpose was focused on disparate *economic*

regulation: "[P]reemption legislation is in the public interest as well as necessary to facilitate interstate commerce. *State economic regulation* of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets. . . . The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." (H.R. Conf. Rep. No. 103-677, 2d. Sess. (1994), reprinted in 1994 U.S. Code Cong. & Admin. News, pp. 1715, 1758-1759, italics added.) In fact, the House Conference Report indicated that "State authority to regulate safety, financial fitness and insurance . . . of motor carriers is unchanged, since State regulation in those areas is not a price, route or service and thus is unaffected." (*Id.* at p. 1757.) We find in the legislative history no expression of a congressional desire to preempt local control over safety issues.

Moreover, we take issue with the Ninth Circuit's conclusion in *Tocher* that under section 14501(c)(2)(A) a state's authority to delegate safety regulations to municipalities must be ignored. The Ninth Circuit reasoned: "If this Court were to hold that a state can always delegate its responsibility to municipalities, Congress would always be required to preempt both state and local laws, or preempt neither. That result would violate fundamental principles of federalism and lead to a distorted interpretation of the Supremacy Clause." (*Tocher v. City of Santa Ana, supra,* 219 F.3d at p. 1051.)

In our view, the *Tocher* concern is overstated. In the FAAA Act Congress did expressly preempt, as a general

rule, any law or regulation by a state or political subdivision of a state. (§ 14501(c)(1).) However, Congress made an express exception for the state's safety regulatory authority. Had Congress intended not to except municipal safety regulations, Congress could have said so. We can discern no violation of principles of federalism in a construction of section 14501(c)(2)(A) that allows a state to delegate its authority to a municipality. (See *Wisconsin Public Intervenor v. Mortier* (1991) 501 U.S. 597, 607-609, 611-612 [act permitting "States" to regulate pesticides authorized states to allow local regulation of pesticides].)

In summary, we conclude that when, as here, the state has delegated authority to local authorities (Veh. Code, § 21100, subd. (g)), the municipal regulations on safety issues fall within the exception of the FAAA Act (§ 14501(c)(2)(A)) and are not preempted.

We further conclude that in the present case, as in *Ace*, the San Francisco ordinances establishing licensing, reporting, recordkeeping, and other requirements for towing businesses are directly related to safety concerns and fall within the safety regulation exception. The permit scheme of the San Francisco Police Code serves to ensure that only qualified persons undertake nonconsensual tows. The permit application process allows the police to check the background of permit applicants and to reject unsuitable persons, e.g., those with a history of vehicle offenses. (S.F. Police Code, § 3004.) Moreover, tow truck drivers must submit a letter of hire from a licensed towing company, thereby ensuring that the company will be accountable for the driver. (S.F. Police Code, § 3003, subd. (d).)

As we explained in connection with Vehicle Code section 22658, the reporting and recordkeeping requirements of the San Francisco ordinances help ensure that vehicles will be towed only for proper purposes. And the San Francisco Police Code's requirement of prompt notice to the police tow desk further serves to avoid burdening the police with mistaken reports of stolen vehicles. (S.F. Police Code, §§ 3057, 3060.)

In any event, even if we were to conclude otherwise and find the San Francisco ordinances preempted by the FAAA Act, we would have no hesitation in affirming the trial court's judgment here. The trial court principally based its judgment upon Servantes's violations of state law, specifically Vehicle Code section 22658. Although the court additionally found that Servantes had violated the permit requirements of the San Francisco Police Code, the court imposed no additional penalties on account of these particular violations.

Furthermore, California's Unfair Competition Act prohibits not only unlawful business practices but also unfair business practices. (Bus. & Prof. Code, § 17200 et seq.) The statute is intentionally broad to give the court maximum discretion to control whatever new schemes may be contrived, even though they are not yet forbidden by law. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180-181; *Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 647.) Servantes is simply incorrect in his assertion that California's Unfair Competition Act prohibits only conduct that is unfair to competitors. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 109-113.) One test for determining an "unfair" practice is that the gravity of the harm to

the victim outweighs the utility of the defendant's conduct. (*State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1103-1104; *Podolsky v. First Healthcare Corp., supra,* at p. 647; *People v. Duz-Mor Diagnostic Laboratory, Inc., supra,* 68 Cal.App.4th at p. 662; but see *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra,* at pp. 184-185 [test held too vague for injuries to competitors].) Here, the injuries inflicted upon the unwitting victims were substantial, while the conduct of Servantes was entirely unethical and unscrupulous with no redeeming value. (See *People v. James* (1981) 122 Cal.App.3d 25, 35-36.)

We find no error in the trial court's conclusion that the conduct of Servantes constituted unlawful business practices in violation of Business and Professions Code section 17200 et seq.

IV. Sufficiency of the Evidence*

As noted, the trial court based its judgment on Servantes's violations of Vehicle Code section 22658. The court found that in 742 out of 747 cases Servantes failed to obtain written authorization from the property owners and in all 747 cases failed to accept credit cards as

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*See footnote 1, *ante.*

payment.[11] Servantes now argues that the evidence was insufficient to support those findings.

First, as to the lack of written authorization, Servantes contends that the only evidence produced was that he failed to maintain any records proving written authorization and that there was no evidence he never actually obtained the authorization. So, his argument runs, the trial court effectively required him to provide proof of written authorization and thereby improperly shifted the burden of proof to him. We disagree.

The trial court could reasonably infer from the totality of the evidence that Servantes routinely towed vehicles without prior written authorization. The court heard testimony from three police investigators that they found no evidence that written authorizations had been given for Bayshore's tows. The trial court also heard evidence concerning two parking lot owners and from numerous vehicle owners indicating that the tows by Bayshore were unauthorized. Moreover, the San Francisco Police Code requires tow operators to maintain records and retain them for three years (S.F. Police Code, § 3060), and the fact that Servantes failed to comply with this recordkeeping requirement supports the inference that written authorizations were never obtained in the first place.

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[11] The court observed that evidence had been presented on other violations of law, including failure to notify the tow desk within 30 minutes, failure to maintain business records, and lack of proper signage. However, the court declined to make findings on these issues, "because they pale by comparison" to the other violations.

Servantes points to the testimony of his drivers, Luis Jacques and Martin Sexton, who testified that they always obtained written authorization for tows from private property. Servantes also relies on his own testimony that his company practice is to obtain written authorization. But such reliance ignores the conflict in the evidence, including that from these very people.

Luis Jacques testified that he filled out tow tags with the signed authorization and gave those tags to Servantes. However, the exhibits introduced at trial showed that those tags did not, in fact, have any written authorizations. When confronted with this evidence, Jacques changed his testimony and asserted that the parking lot owners retained the authorizations.

Martin Sexton testified that he had the agent at the parking lot sign his receipt book to indicate authorization for the tow, and he turned in his book to Servantes. Servantes, too, testified that the written authorizations are on the receipt books carried by drivers and turned into him. To the contrary, at his deposition Servantes testified that the written authorizations accompanied the receipts given to the vehicle owners upon release of the vehicle. Servantes also testified at his deposition that the written authorizations had been lost or misplaced, while at trial he testified they had been intentionally discarded. Based on these inconsistencies, the trial court could, and understandably did, reject the testimony of Servantes and his drivers.

Second, as to the refusal to accept credit card payments, Servantes argues that the only evidence put forth was that Servantes did not obtain payment by credit card

and this evidence failed to establish that he actually refused a request by a vehicle owner to use a credit card. Again, the argument ignores all rules of appellate review.

The deposition testimony of Luis Jacques established that it was company practice to demand cash payment. Although Jacques testified at trial that credit cards were accepted, he also testified that he would write "credit card" on the receipt in such a case. None of the receipts introduced at trial showed payment by credit card. Servantes's credit card statement showed virtually no credit card activity. Moreover, the court heard testimony from 11 victims that they were told to bring cash to retrieve their vehicles, including two victims who tried to use a credit card. The trial court could reasonably infer from the evidence that Servantes refused to accept any payments other than cash for release of the towed vehicles.

V. Excessive Fines*

Servantes next contends that the penalties imposed, totaling $214,200, are excessive and disproportionate to his earnings and net worth. We disagree.

Section 17206 of the Business and Professions Code requires the trial court to impose a civil penalty of up to $2,500 for each violation of California's Unfair Competition Act. Although the statute does not define what constitutes a single violation, the courts have upheld a "per victim" calculation. (*People v. Toomey* (1985) 157 Cal.App.3d 1, 22-23.)

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*See footnote 1, *ante*.

The duty to impose some penalty is mandatory. (*People v. Orange County Charitable Services* (1999) 73 Cal.App.4th 1054, 1071, fn. 10; *People v. National Association of Realtors* (1984) 155 Cal.App.3d 578, 584-585.) However, the amount of the penalty is within the court's discretion. (*Hewlett v. Squaw Valley Ski Corp., supra,* 54 Cal.App.4th at p. 537; see *People ex rel. Smith v. Parkmerced Co.* (1988) 198 Cal.App.3d 683, 692.) In assessing the amount of the penalty, the court must consider all the relevant circumstances, including the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the misconduct, and the defendant's assets, liabilities, and net worth. (Bus. & Prof. Code, § 17206, subd. (b).)

In addition to the civil penalty of section 17206, section 17203 of the Business and Professions Code authorizes an order for restitution or disgorgement of profits acquired from the misconduct. (*People v. Thomas Shelton Powers, M.D., Inc.* (1992) 2 Cal.App.4th 330, 340-341.) And section 17207 of the Business and Professions Code provides for a penalty of up to $6,000 for each violation of an injunction issued to restrain unfair competition.

We find no abuse of discretion in the trial court's decision to impose the penalties of $100 for each illegal tow and $500 for each violation of the preliminary injunction. Nor do we find any abuse of discretion in the order for restitution of $52,500 to the victims. The penalties imposed were far less than the amounts allowed by statute for each violation. Servantes committed hundreds of violations of the towing laws over the span of several years, and he violated the preliminary injunction well

over 100 times. His misconduct was intentional, persistent, and in flagrant disregard of the efforts to restrain him. Finally, there was expert testimony that from 1996 to the date of trial Servantes earned an average annual profit of $45,380, about one-third of which was derived from private property tows. The trial court was not obligated to accept Servantes's testimony that he earned only $28,000 per year.

Servantes also complains that the civil penalty of $74,700, calculated at $100 for each of Servantes's 747 violations, was unsupported by the evidence, as the court had no proof that each of the 747 violations was actually committed. We reject the argument.

The court had evidence from the logs of the police tow desk that Servantes conducted at least 747 private property tows during the period from January 1, 1996 to June 30, 1999. As we have already outlined, the court also had before it evidence of Servantes's custom and practice to demand cash payments from the vehicle owners for release of the towed vehicles. The court specifically declined to hear additional witnesses, concluding it could draw reasonable inferences from the evidence presented. We find no error in the trial court's finding that Servantes demanded cash payments from all 747 vehicle owners.

VI. Overbroad Injunction*

Finally, Servantes complains that the injunction prohibiting him from all private property towing in the State

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*See footnote 1, *ante*.

of California was beyond the jurisdiction of the trial court. Servantes asserts that the trial court had no authority to govern his activities outside San Francisco and no authority to prohibit his engagement in a lawful business. Again, we disagree.

First, Servantes's misconduct constituted violations of state law (Veh. Code, § 22658; Bus. & Prof. Code, § 17200 et seq.). Hence, his reliance on the principle that municipal towing regulations must be confined to businesses within the local jurisdiction (Veh. Code, § 21100, subd. (g)) is unavailing. The power of the court to enforce state law is not limited by the regulatory effect of the San Francisco ordinances.

More significantly, the trial court has broad authority to grant injunctive relief and make all necessary orders to prevent a continuation of unlawful business practices. (Bus. & Prof. Code, § 17203; *Hewlett v. Squaw Valley Ski Corp., supra,* 54 Cal.App.4th at p. 540; *People v. Toomey, supra,* 157 Cal.App.3d at pp. 19-20.) In *Hewlett,* for example, the Court of Appeal upheld the trial court's order permanently enjoining a ski resort from developing its land after it had illegally and cavalierly removed trees from other sections. The court held the injunction was "an appropriate response to the egregious conduct and disdainful attitude exhibited by Squaw Valley." (*Hewlett v. Squaw Valley Ski Corp., supra,* at p. 543.)

Likewise here, Servantes has shown himself to be undeterred by revocation of his towing permit or even by issuance of a preliminary injunction, which he flouted with abandon. His continuing flagrant violations of state and local laws are a threat to the public welfare and

obviously cannot be stopped simply by enjoining him from future violations. The trial court issued the injunction after considering "the public safety concerns, defendant's repeated disregard for applicable statutes and court orders, and the rights of the defendant to earn a living. . . . " We find no error in the court's decision to end Servantes's participation in towing from private property.

VII. DISPOSITION

The judgment is affirmed.

RICHMAN, J.*

We concur.

JONES, P.J.

STEVENS, J.

*Judge of the Alameda Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The People ex rel. Louise Renne, as City Attorney, etc. v. Patrick Servantes (A089493)

Trial Judge	Paul H. Alvarado, Judge
Trial Court	Superior Court of the City and County of San Francisco, Case No. 997979
Counsel for Defendant/ Appellant Patrick Servantes	David W. Washington, Esq.
Counsel for Plaintiff/ Respondent City and County of San Francisco	Louise H. Renne City Attorney Kimon Manolius Ellen Forman Rose-Ellen Heinz Deputy City Attorneys